19-485

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 488. 221

THE MAYOR AND CITY COUNCIL OF NASHVILLE, PLAINTIFFS IN ERROR,

vs.

H. LINDSEY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF TENNESSEE.

FILED SEPTEMBER 19, 1872.

SUPREME COURT OF THE UNITED STATES.

No. 438.

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vs.

H. LINDSEY.

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1 The President of the United States of America to the judges of the circuit court of the United States for the middle district of Tennessee, greeting:

Because, in the record & proceedings as also in the rendition of a judgment in a plea which is in the said circuit court of the United States for the middle district of Tennessee, before you, between H. Lindsey and The Mayor & City Council of Nashville, a manifest error hath happened, to the great damage of the said Mayor & City Council of Nashville, as by its complaint appears; and it being fit that the error, if any there hath been, should be duly corrected & full & speedy justice done to the parties aforesaid in this behalf, you are therefore commanded hereby, if judgment be therein given, that then, under your seal, distinctly & openly, you send the record & proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have same at Washington on the first Monday of December next, in the said Supreme Court to be then & there held, that, the record & proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right & according to law & custom of the United States should be done.

Witness the honorable Salmon P. Chase, Chief Justice of the said Supreme Court of the United States, this first Monday of December, in the year of our Lord eighteen hundred & seventy-one, & of the Independence of the United States the 96th.

[SEAL.]

E. R. CAMPBELL,
Clerk U. S. Circuit Court Mid. Dist. Tenn.

2 I acknowledge the service of the within writ of error upon me by filing a copy of the same for me in the clerk's office of the circuit court of the United States for the middle district of Tennessee, Aug. 1872.

R. McP. SMITH,
Attorney of H. Lindsey, Defendant in Error.

(Indorsed:) The Mayor & City Council of Nashville vs. H. Lindsey. Writ of error. Filed August 3, 1872. E. R. Campbell, cl'k.

3 United States of America to H. Lindsey, greeting:

You are hereby cited & admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the middle district of Tennessee, wherein The Mayor & City Council of Nashville is plaintiff in error & you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice done in that behalf.

Witness the honorable Salmon P. Chase, Chief Justice of the said Supreme Court of the United States, this 5th day of August, in the year of our Lord eighteen hundred & seventy.

CONNALLY F. TRIGG,
District Judge of the United States for the Districts of Tennessee, & sole Presiding Judge upon the trial of the above-mentioned cause in said Circuit Court.

(Indorsed:) The Mayor & City Council of Nashville vs. H. Lindsey. Citation. Filed August 6, 1872. E. R. Cambell, clerk.

I acknowledge service of the within citation. Aug. 6, 1872.
R. McP. SMITH,
Attorney of H. Lindsey.

4 MIDDLE DISTRICT OF TENNESSEE, *ss:*

At the circuit court of the United States within and for the district aforesaid, begun and held at the Federal court-room at the capitol of said State, in Nashville, on the third Monday, being the 15th day of April, in the year of our Lord 1872, and of the Independence of the United States the 96th—

Present, the Hon. Connally F. Trigg, United States district judge for the several districts of Tennessee; present, also, Edward R. Campbell, esq., clerk of said court, and W'm Spence, esq., marshal—

The following proceedings were had, to wit:

On the 11th day of March, 1872, a summons was issued which is as follows, to wit:

Summons.

H. LINDSEY
vs.
THE MAYOR & CITY COUNCIL OF NASHVILLE. } Summons.

The President of the United States of America to the marshal of the middle district of Tennessee, greeting:

You are hereby commanded to summon The Mayor & City Council of Nashville, a corporation created by the laws of the State of Tennessee, and having its principal office and place of business at Nashville, in said district, if to be found in your district, to be and appear before the judges of the circuit court of the United States in the
5 sixth circuit for the middle district of Tennessee, at the Federal court-room, at Nashville, in said State, on the third Monday in April next, then and there to answer H. Lindsey, a citizen of the State of Massachusetts, of a plea of trespass on the case, to his damage five thousand dollars.

Herein fail not, and have then and there this writ.

Witness the Hon. Salmon P. Chase, Chief Justice of the Supreme Court of the United States, this the third Monday in October, in the year of our Lord eighteen hundred and seventy-one, and of the Independence of the United States the 96th.

E. R. CAMPBELL, *Clerk.*

On the back of which summons are the following endorsements:

Issuance.

This summons was issued on the 11th day of March, 1872.
E. R. CAMPBELL, *Clerk.*

Return.

Came to hand same day issued, and executed on the 14th of March, 1872, on K. J. Morris, mayor of the defendant corporation in Nashville.
WM. SPENCE, *U. S. Marshal,*
By ED. S. WHEAT, *Deputy.*

On the 11th day of March, 1872, a declaration was filed, which is as follows, to wit:

Declaration.

Circuit court of United States for the middle district of Tennessee.
April term, A. D. 1872.

6 H. Lindsey, citizen of the State of Massachusetts, by attorney, complains of The Mayor & City Council of Nashville, a corporation chartered by the laws of the State of Tennessee, and having its principal office and place of business at Nashville, in the middle district of Tennessee, which is in court by summons of a plea of trespass on the case on promises.

For that, on March 10th, 1869, in said district, defendant executed its three certain promissory notes here shown to the court, by each of which it promised to pay to Henry Greener, or bearer, the sum of $1,000, on demand; said notes were then and there, for valuable consideration, delivered to said Greener by defendant. Plaintiff is now the legal owner and the bearer of all of said notes. Payment of all of them has, by plaintiff, often been demanded of defendant, but no part of any of them has ever been paid, and all three said notes are still wholly unpaid.

And further, on March 10, 1869, defendant being justly indebted to said Henry Greener, W. Mills, the then recorder of defendant, in the exercise of his duty as such recorder, gave to said Greener three written orders upon the treasurer of defendant, numbered, respectively, 4810, 4821, & 4822, which are here to the court shown, (together with other such orders, the aggregate amount of all said orders being the amount of defendant's indebtedness to said Greener, and said orders being all given as aforesaid to said Greener in payment of said indebtedness, and being received by him as such payment,) said three orders, numbered as aforesaid, were, before the same were delivered to said Greener,
7 and after the same had been signed by said recorder, countersigned by W'm C. Kinney, an officer of defendant, then legally acting as mayor of defendant. By each of said three orders the treasurer of defendant was directed to pay to said Greener, or bearer, the sum of $1,000, on account of bills payable; said three orders, (which are commonly known as "corporation checks,") were presented by said Greener to Thomas Magrane, treasurer of defendant, on said March 10, 1869, for his approval, who approved the same by writing his name upon the back of each one, together with an addition indicating his official character. Thereupon said three orders or checks became, in legal effect, promisory notes of defendant, payable to bearer on demand.

Afterwards, for value received, plaintiff became the lawful owner and bearer of said three orders, No.'s 4810, 4821, & 4822, respectively, each as stated for $1,000. And plaintiff is still the owner and bearer of said orders. He has, since he became such owner and bearer, often demanded payment of said orders of defendant, but all three remain still wholly unpaid.

And further, on Feb'y 1, 1872, at Nashville, defendant was justly indebted to plaintiff in the sum of $4,000, for money loaned by plaintiff to defendant, and for money laid out and expended by plaintiff for defendant's use, and at its special instance and request, and for money had and received by defendant to the use of plaintiff, and for balance of accounts then and there stated between them and found, and
8 by defendant admitted to be due from it to plaintiff. And being

so indebted, and in consideration thereof, defendant then and there undertook and promised to pay said sum to plaintiff on demand, yet, though often since demanded, no part of the same has ever been paid.

By reason of the premises plaintiff hath sustained damages amounting to the sum of $5,000. Hence suit.

R. MCP. SMITH,
Attorney for Plaintiff.

On the 23d day of May, 1872, the defendant, by leave of the court, filed the following pleas.

Pleas.

And the said defendant comes, by its attorneys, and defends the wrong and injury, when, &c., and craves oyer of the said writings or checks sued on in this acting, and they are read to it in the words and figures as follows:

"$1,000.00.] [No. 4810.

"NASHVILLE, *March* 10, 1869.

"Treasurer corporation of Nashville: Pay to Henry Greener, or bearer, one thousand $\frac{00}{100}$ dollars, on account of bills' pay.

"W. MILLS, *Recorder.*

"W. C. KINNEY, *Mayor pro tem.*"

"$1,000.00.] [No. 4821.

"NASHVILLE, *March* 10, 1869.

"Treasurer corporation of Nashville: Pay to Henry Greener, or bearer, one thousand $\frac{00}{100}$ dollars, on account of bills pay.

"W. MILLS, *Recorder.*

"W. C. KINNEY, *Mayor pro tem.*"

"$1,000.00.] [No. 4822

"NASHVILLE, *March* 10, 1869.

"Treasurer corporation of Nashville: Pay to Henry Greener, or bearer, one thousand $\frac{00}{100}$ dollars, on account of bills pay.

"W. MILLS, *Recorder.*

"W. C. KINNEY, *Mayor pro tem.*"

9 And thereupon defendant, for plea, says that the said paper-writings or checks were not executed by it, or by any person lawfully authorized to bind it in the premises; and of this it puts itself upon the country.

E. H. EWING,
W. F. & H. COOPER,
JOHN LELLYETT,
Atty's for Def't.

In testimony whereof the said defendant hath caused its common seal to be affixed to the above plea by its recorder and mayor.

K. J. MORRIS, *Mayor.*

THO'S J. HAILE, *Recorder.*

U. S. circuit court, middle district of Tennessee, *ss:*

Personally appeared before me, E. R. Campbell, clerk of said court, K. J. Morris, mayor of the city of Nashville, and made oath that he verily believes the above plea to be true in substance and in fact.

K. J. MORRIS.

Subscribed and sworn to before me this May 23, 1872.

E. R. CAMPBELL, *Clerk.*

And for further plea the said defendant says that it did not undertake or promise in manner and form, as the said plaintiff hath alleged against it; and of this it puts itself upon the country.

E. H. EWING,
W. F. & H. COOPER,
JOHN LELLYETT,
Atty's for Def't.

John Lellyett, one of the attorneys above signed, makes oath
10 that the above pleas are filed in good faith, to raise the real and meritorious defenses of defendant, and not for mere delay.

JOHN LELLYETT.

Subscribed and sworn to before me this May 23, 1872.

E. R. CAMPBELL, *Clerk.*

On the 12th day of July, 1872, plaintiff filed replications to the pleas of defendant, which are as follows:

Replication.

Plaintiff, for replication to defendant's first plea, says that the three several instruments set forth in said plea are the act and deed of defendant; and this he prays may be inquired of by the country.

And for replication to defendant's second plea, plaintiff says that he doth the like.

R. McP. SMITH,
Attorney of Plaintiff.

On the 25th day of July, 1872, a judgment was rendered in said cause, which is as follows:

Judgment.

H. LINDSEY
v.
THE MAYOR & CITY COUNCIL OF NASHVILLE.

Came the parties, by their attorneys, and came also a jury of good and lawful men, to wit, George Beckwith, Hu. McCrea, James Davis, B. S. Weller, Perry Payne, James Spurlock, J. P. Smith, William Outlaw, B. N. Carter, W. H. Fuqua, J. C. Herrington, and J. T. Brown, who, being elected, tried, and sworn, well and truly to try the issue joined, after hearing the evidence, the argument of counsel, and the charge of
11 the court, upon their oaths do say that they find the issue in favor of the plaintiff, and that the plaintiff has sustained dam-

ages, by reason of the non-performance of the promises and undertakings in the declaration mentioned, amounting to the sum of three thousand six hundred and seven $\frac{50}{100}$ dollars.

It is therefore considered by the court that the plaintiff recover of the defendant the damages aforesaid, by the jury aforesaid assessed, and, also, the costs by him about his suit in this behalf expended, and that fi. fa. issue for the same.

And thereupon the defendant presented to the court its bill of exceptions to the rulings of the court at the trial, which was signed and sealed, and ordered to be made a part of the record of this cause.

On the 25th day of July, 1872, a bill of exceptions to the rulings of the court, at the trial, was filed by the defendant; which is in the words following:

Bill of exceptions.

H. LINDSEY
v.
THE MAYOR & CITY COUNCIL OF NASHVILLE. } Bill of exceptions.

At the trial of the above-entitled cause, plaintiff introduced in evidence three instruments, commonly known as "corporation checks," of which the following is a copy of one:

$1,000.] [No. 4810.

NASHVILLE, *March* 10, 1869.

Treasurer of the corporation of Nashville: Pay to Henry Greener, or bearer, one thousand dollars, on account of bills payable.

W. MILLS, *Recorder.*

12 W. C. KINNEY, *Mayor pro tem.*

The other two instruments were exactly similar, except in number, being numbered, respectively, 4821 and 4822, to that above set forth. All of said instruments were stamped with the seal of the corporation of Nashville, and all were endorsed "Thomas Magrane, t'r, March 10, 1869." Plaintiff further introduced evidence tending to show that the signatures to said instruments were genuine, and that they were the signatures of the officers authorized by city ordinance to sign checks upon the city treasury. Also, evidence to show the genuineness of the seal of the corporation of Nashville, impressed on each said instrument. Also, evidence to show that the endorsements of Thomas Magrane upon said checks were genuine, and that he was at the time of making the same the treasurer of the corporation of Nashville. Also, evidence tending to show that, for many years, the custom of defendant corporation had been to issue checks, in form the same or similar to said three checks, in payment of debts, or to draw money from the city treasury. Also, that it had been the custom for many years, when the treasurer failed to pay such checks, on their first presentation, for him to write his name on the back of such checks, with the date of such presentation; and, afterwards, in the payment of such checks, so endorsed, to allow interest from the date, so written thereon; and that it was usual to present such checks for endorsement to draw interest when
13 it was known there was no funds for their payment. Also, evidence tending to show that, for many years, it had been the well-known custom of the proper collecting officers of said corporation to

receive such checks for taxes and other dues to said corporation. Also, evidence to show that, at the time when the checks sued on, in the suit aforesaid, were made, and at the time they were bought by plaintiff, defendant corporation was largely indebted and involved in financial embarrassment; that many such checks were outstanding unpaid, and were commonly bought and sold in the market, and that nearly all of the taxes were paid to the city-collector in such checks.

In the course of the examination of William Mills, witness for plaintiff, said witness, in answer to a question asked by plaintiff's counsel, stated that all three said checks (sued on in this cause) were made in the usual course of business of defendant, and issued for corporation purposes, which evidence was, at the time, objected to by defendant's counsel, on the ground that the best evidence, on this point, would appear in the proper record of the corporation, which he then and there produced for the inspection of the witness and court; but the court overruled said objection, and admitted said evidence; to which ruling of the court, defendant's counsel then and there excepted.

On the cross-examination of said witness, defendant's counsel offered to prove by him (he having been the recorder of the defendant,
14 and kept said records, which it was his duty to do) that it was his uniform practice, as such recorder, to keep a faithful and complete record of the boards of the city council of Nashville, and that said record showed, in each month, what accounts were allowed by said council, and defendant's counsel further sought to prove by said witness and said records, that the checks sued on were not in fact allowed by said council, nor issued in pursuance of any city ordinance, and that no evidence could be found in said records of said checks being issued for any consideration, or by any authority whatever; but the court refused to admit said evidence; to which ruling of the court the defendant, by its counsel, then and there excepted.

Defendant's counsel further offered to show that said three checks sued on were among the number not allowed by the said city council, and were issued upon no other authority than the direction of a member of the city council, (being chairman of the finance committee;) but the court refused to allow such evidence to be introduced; to which ruling of the court, defendant's counsel then and there excepted.

The plaintiff's witness, William Mills, who was recorder of the corporation from October, 1867, to Sept., 1869, on cross-examination, detailed and explained the practice pursued in the issuance of checks by himself and the mayor. In addition to the checks issued by order of council in the allowance of accounts, proof was introduced tending to show that checks were frequently issued by order of the chairman of
15 the finance committee without other authority, and that the checks in suit (the three aforesaid) were of this character.

Plaintiff then offered parol evidence tending to show that the practice of issuing checks in the manner described by the witness Mills (as above) and selling them or hypothecating them for money loaned, was known to the city council through its official action, and had been pursued without objection for several months, which evidence was objected to by defendants' counsel as inadmissible; but the objection was overruled by the court, and the evidence admitted; to which ruling of the court defendants' counsel then and there excepted.

A witness for the plaintiff, upon his cross-examination, testified that the three checks sued on in this cause were among a number issued as collateral security to secure a loan to the city. That the character of the loan was as follows: Half of the amount loaned was paid by the

lender in cash and half in checks of the city, similar in form to those aforesaid. A note was then given which, in form, bound the city to return at maturity the combined amount of such checks and cash, with six per cent. interest from date of note, and to secure the payment of this sum, checks were delivered to the lender (similar to those sued on) considerably exceeding in amount the face of the note, which checks were to be held as collateral security for this purpose; and upon the face of the note it was expressed that the holder should have full
16 power and authority to sell said collaterals at public or private sale on non-payment of the note at maturity or at any time thereafter without advertisement or giving otherwise any notice to the city; and that in case of public sale the holder might purchase without being liable to account for more than the net proceeds of such sale, said note being signed by the mayor and recorder, and the loans of this character being transacted by the chairman of the finance committee.

It was also shown that, upon the same day on which the note was given to secure which the checks in suit aforesaid together with others were given, said checks were all presented to the treasurer of the corporation for his signature, and endorsed by him with his name and the date of such presentation, and that the note and checks were then delivered to the lender of the cash and checks for which said was given, who, within the next several days and some months before the maturity of the note, sold the said checks at the current rate to brokers in Nashville, said rate being between seventy-five and eighty cents on the dollar.

The charter and ordinances of the city of Nashville, printed by order of the city council, were put in evidence, and it is agreed that in the Supreme Court of the United States any part of either said charter or said ordinances may be used as evidence from the printed statutes of the State of Tennessee, or the printed volume of the evidences of
17 the corporation, without any part of the same being copied into this record.

Section 7 of chapter 23, Digest of City Ordinances of 1868, page 98, is in the following language, (which provision of the city laws was given in evidence by the plaintiff at the trial:) "Sec. 7. In case of vacancy in the office of mayor by the death, resignation, removal from office, or temporary absence of the mayor from the city, the chairman of the street committee shall act as mayor pro tem. until such vacancy is filled, or until the return of the mayor to the city."

Also plaintiff offered in evidence section 12 of the same chapter of city laws, (see said digest, page 99,) which is in the following language: "Sec. 12. All checks issued by the recorder shall be countersigned by the mayor, and he shall be required to keep accurate accounts of the checks issued, the amount of each, and to whom issued. The allowance of accounts and appropriation to pay the same shall be made at the first regular meeting each month of the two boards, respectively."

The above being sections of a chapter of city ordinances and not parts of the charter of defendant.

Defendant put in evidence the following provision of its published bye-laws in force in 1857 to the present time:

CHAPTER 54, SECTION 4. "That the recorder shall keep a well-bound book, in which shall be fairly noted down all licenses by him granted, to whom granted, and for what purposes, specifying the dates of such licenses, with the several sums received therefor annexed.
18 And he shall keep a well-bound book in which he shall open and keep a fair account of the settlements made with the treasurer,

collector of the revenue, and other officers and persons with whom the corporation may have money transactions. He shall attend all meetings of the city council and keep a faithful record of their proceedings, and shall perform such other services as are or may be required of him by the laws and ordinances of this corporation."

CHAPTER 23. SEC. 8. "That the mayor shall, at the commencement of the municipal year, appoint a standing committee of three, who shall be known as the committee of improvements and expenditures."

SECTION 9. "That all propositions having any relation to improvements, or the expenditure of moneys, or the incurring of any liability, shall be referred to said committee, whose duty it shall be to enquire into the character of the improvements proposed, expenditure or liability, and the immediate necessity for the same, and make their written report to the city council, giving the result of their investigations, and their reasons for approval or rejection of said propositions."

SECTION 10. "That no person, whether a member of the city council or officer of the corporation, shall order, contract, or do anything whereby an expenditure of money is the consequence or liability is to be incurred, unless authorized by existing laws or by order of the city
19 council; and the recorder is hereby required to issue no check upon the treasurer, in his official character, for money, unless by authority of the city council, or in pursuance of existing laws of the corporation: *Provided*, That the water-works committee shall not be prevented, in case of emergency, from making all necessary expenditures, to keep the water-works in good repair and condition, and in active operation."

SEC. 12. "All checks issued by the recorder shall be countersigned by the mayor, and he shall be required to keep accurate accounts of the checks issued, the amount of each, and to whom issued. The allowance of accounts and appropriation to pay the same shall be made at the first regular meeting of each month of the two boards, respectively."

The defendant further put in evidence the following section of its charter, passed by the legislature of Tennessee, in 1848, and offered evidence to show the publication of the above by-laws, made under the provisions of said section of its charter:

ACT JAN. 31, 1848. SEC. 10. "There shall be prepared and published, by the city council, a digest of all the ordinances and resolutions of a public nature now in force, within six months after the passage of this act, and a like digest once in every three years thereafter."

And defendant further offered evidence to prove that it had
20 been the uniform usage of the corporate authorities to issue no checks other than such as were issued by order of the city council, and under the provisions of existing laws, until some time after Sept., 1868, when the administration of which said recorder was an officer, and said recorder himself, came into power; but the court refused to admit evidence tending to prove this point; to which ruling of the court defendant's counsel then and there excepted.

Defendant further introduced proof tending to show that the city council had no knowledge of the manner of making checks, as detailed by the witness Mills, on the mere order of the chairman of the finance committee, and their hypothecation or sale for money.

By agreement of counsel of both parties the following sections of amendments to defendant's charter, passed by the legislature of Tennessee, as affecting the authority of said Kinney to act as mayor pro tem., or countersign checks as such: "Should a vacancy occur in the

office of mayor, the same shall be filled by a joint vote of the two houses." (Act of Feb'y 18, 1858, sec. 14.) "That hereafter no member of either house of the city council shall be eligible to any office within the gift of the corporation during the term for which he may have been elected." (Act of M'ch 16, 1868, sec. 32.)

Upon the close of the testimony defendant's counsel requested the court to charge the jury, as follows:

21 1st. That the corporation of Nashville had no power, under its charter, to borrow money, and that, therefore, any checks issued for this purpose, either by hypothecation or by sale in the market for what they would bring, would be ultra vires of the corporate powers, and void. Refused.

2nd. The court so refusing, the defendant then requested the court to charge that the corporation could only exercise the power of borrowing money by ordinance of the city council for some specific purpose within the chartered powers, and any checks or other instruments made for the purpose of borrowing money without such ordinance, either by hypothecation or sale in the market by the officers of the corporation, would be void. Refused.

3rd. That it was the duty of every person taking a corporation-check from any of its officers or purchasing such checks, to take notice of the powers of the officers of the corporation as defined by the charter and ordinances, and to examine and ascertain whether the check was authorized by ordinance. Refused.

4th. That the city council of Nashville, as the legislative department of the corporation, could not delegate its powers, under the charter, to any one or more of its officers; that the contracting of liabilities for corporate purposes and the allowance of claims against the corporation, and the appropriation of money for the payment of liabilities and claims were legislative functions that could not be delegated. Refused.

22 5th. That the corporation of Nashville had no power under its charter to issue negotiable secureties with all the attributes of negotiability, and that any secureties issued by it, negotiable in form, would, nevertheless, be subject to impeachment in whose hands soever they might come. Refused.

6th. That said corporation could not issue negotiable secureties at all; that the instruments sued on were only the mode adopted by the corporation of paying out money in the treasury, and could only be sued on by or in the name of the original party to whom issued, and that if the jury found that plaintiff was not the person to whom the checks sued on were originally issued and made payable, he could not recover on them. Refused.

7th. That although the recorder of the corporation, or he and the mayor, or both of them, and the chairman of the finance committee can lawfully issue warrants or checks on the treasurer for some purposes, yet an inquiry can be made in any case into the purpose for which a check was issued, and that if the jury should find that the checks in controversy were not authorized by corporation ordinance, the plaintiff could not recover on them. Refused.

8th. That checks drawn by one office of a municipal corporation on another for the purpose of drawing money from the corporation treasury are not in their nature negotiable without an express authority from the legislative department of the corporation, and that the checks

23 in suit were not negotiable unless the jury should find that there was such authority that they should be made so. Refused.

9th. That if it appeared to the jury from the evidence in the cause that the checks sued on therein were, with other similar ones, issued as collateral security for a note bearing the same date as said checks, payable to the payee named in the checks and due several months after date, with power to the payee of the note to sell said checks in default *in default* of payment of said note and without other authority to sell the same; and, further, that the note-holder did sell the collateral checks, including those in suit, (the same having been first presented to the treasury for payment, and payment having been refused,) several days thereafter, and a considerable time before the maturity of the note and in violation of the arrangement by which he was to hold the checks until default in the payment of the note at maturity, then, in that case, the plaintiff purchasing the checks in suit after said illegal sale and issuance thereof does not hold the same by a valid title and is not entitled to recover thereon in this action. Refused.

10th. Defendant asked the court to charge the jury that, if the jury find *find* from the proof that the checks sued on were not countersigned by the mayor of the city, but by a person acting as mayor pro tempore,
such person being a member of the city council, and chairman of
24 the street committee, and only thereby becoming mayor pro tem.,
then in that case this action cannot be maintained on said checks; but the court refused to so charge.

And to the action of the court in refusing to charge as requested as aforesaid, defendant's counsel except to each such refusal, excepting at the time thereof.

The court then charged the jury (among other things not specially excepted to) as follows:

That the charter of the city of Nashville authorized it to issue promissory notes and other secureties for lawful debts, and the instruments given in evidence, if signed by the proper officers or agents and given for a good consideration, are legal and are obligatory upon defendant. To which instruction of the court defendant's counsel then and there excepted.

That it was in evidence that, by long-continued usage, such instruments have been signed and issued by the officers who signed and issued them, and that if the jury credited this testimony, which was uncontradicted, it was sufficient to authorize them to find that these officers, the mayor (and in his absence the chairman of the street committee acting in his stead, under the ordinances of the corporation, the recorder and the treasurer) were the agents of the corporation for this purpose and competent to bind it by these instruments. That a corporation, unless restricted as to manner by its charter, may, by holding out to the public officers as clothed with certain powers, become bound by their
25 acts within the scope of the powers usually exercised. To which
instruction of the court defendant's counsel then and there excepted.

It is objected that, although these instruments may be signed by proper officers, competent under the charter and the usage proved to sign and issue them under certain circumstances, yet such officers have no right to do so unless the accounts for which they are given are allowed by the council. There is some evidence on this point and more was offered by defendant and rejected by the court, to show that it was the invariable usage of the corporation. The court charged that no matter how universal may have been this usage, or what construction of its ordinances in this regard, they are wholly immaterial. The purchaser of the instruments was authorized to presume that such allowances had

been made, and without proof that they knew it had been omitted, are as fully entitled to recover as if the records of the corporation contained a formal allowance of the accounts by the council. To which instruction of the court defendant's counsel then and there excepted.

That the defendant had power to make the instruments given in evidence, (the three checks aforesaid,) which were in legal effect promissory notes, and as it was admitted that they were signed by the officers who have for many years performed that duty, they were, when duly issued obligatory. To which instructions defendant's counsel then and there excepted.

26 That if the jury believed that it was the common usage of the finance committee, known to the corporation, to pledge its checks in security for its notes, and that the checks in suit were so pledged in conformity with this usage, and that the three checks in suit were, a few days after their date, and a considerable time before the maturity of the note they were given to secure; yet, if the checks were purchased without notice on the part of the purchaser of a premature sale or of any irregularity in their issue, then plaintiff would be entitled to recover for the face of the checks and interest. To which ruling of the court defendant's counsel then and there excepted.

That if the jury should find all these facts adversely to plaintiff, they would find a verdict for such sum only as they might be satisfied that the corporation had received in return for said checks, and appropriated to the proper uses of the city with interest. To which ruling of the court defendant's counsel then and there excepted.

And thereupon defendants' counsel presented to the court this their bill of exceptions, which was signed and sealed, and ordered to be made a part of the record in said cause.

CONNALLY F. TRIGG, [SEAL.]
United States District Judge, Presiding.

27 On the 25th day of July, 1872, an appeal bond was filed which is as follows:

Bond.

Know all men by these presents that we, John Lellyett, K. J. Morris, A. J. Smith, A. C. Carter, J. M. Reed, W. H. Perry, W'm Litterer, and M. B. Howell, securities of the plaintiff in error, are held and firmly bound unto H. Lindsey, in the just and full sum of seven thousand two hundred and fifteen dollars, to be paid to the said H. Lindsey, his certain attorneys, executors, administrators, and assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents, signed with our hands, and sealed with our seals, and dated this 25th day of July, 1872.

Whereas lately in a suit depending in the circuit court of the United States for the middle district of Tennessee, between H. Lindsey and The Mayor & City Council of Nashville, a judgment was rendered against said Mayor & City Council of Nashville; and the said Mayor & City Council of Nashville having obtained a writ of error and filed a copy thereof in the clerk's office of said court to reverse the judgment in the aforesaid suit, and a citation directed to the said H. Lindsey,

28 citing and admonishing him to be and appear at a Supreme Court of the United States to be holden at Washington on the 1st Monday of December next:

Now, the condition of the above obligation is such, that if the said Mayor & City Council of Nashville shall prosecute said writ of error to effect, and answer all damages and costs if they shall fail to make good their plea, then this obligation to be void; otherwise to remain in full force and virtue.

JOHN LELLYETT. [SEAL.]
K. J. MORRIS. [SEAL.]
A. J. SMITH. [SEAL.]
A. C. CARTER. [SEAL.]
JAMES M. REED. [SEAL.]
W'M H. PERRY. [SEAL.]
W'M LITTERER. [SEAL.]
M. B. HOWELL. [SEAL.]

Signed, sealed, and delivered in the presence of—
J. W. CAMPBELL.

Approved by me.

CONNALLY F. TRIGG,
U. S. District Judge, Presiding.

UNITED STATES OF AMERICA,
Middle District of Tennessee, ss:

I, Edward R. Campbell, clerk of the circuit court of the United
29 States, within and for the district aforesaid, do hereby certify that the foregoing is a true and perfect transcript of the record and proceeding had in said court, in the cause wherein H. Lindsey was plaintiff, and The Mayor and City Council of Nashville was defendant, as the same appears of record and on file in my office.

In testimony whereof I have hereunto set my hand and affixed the seal of our said court at office in Nashville, in said district, this the 3rd day of September, in the year of your Lord one thousand eight hundred and seventy-two, and the 97th year of the Independence of the United States.

[SEAL.] E. R. CAMPBELL, *Clerk.*

(Indorsement on cover:) No. 438. The Mayor and City Council of Nashville, plaintiffs in error, vs. H. Lindsey. M. Tennessee C. C. U. S. Filed 19th October, 1872.

19 F 485

Supreme Court of the United States,

No. 221

The Mayor and City Council of Nashville,

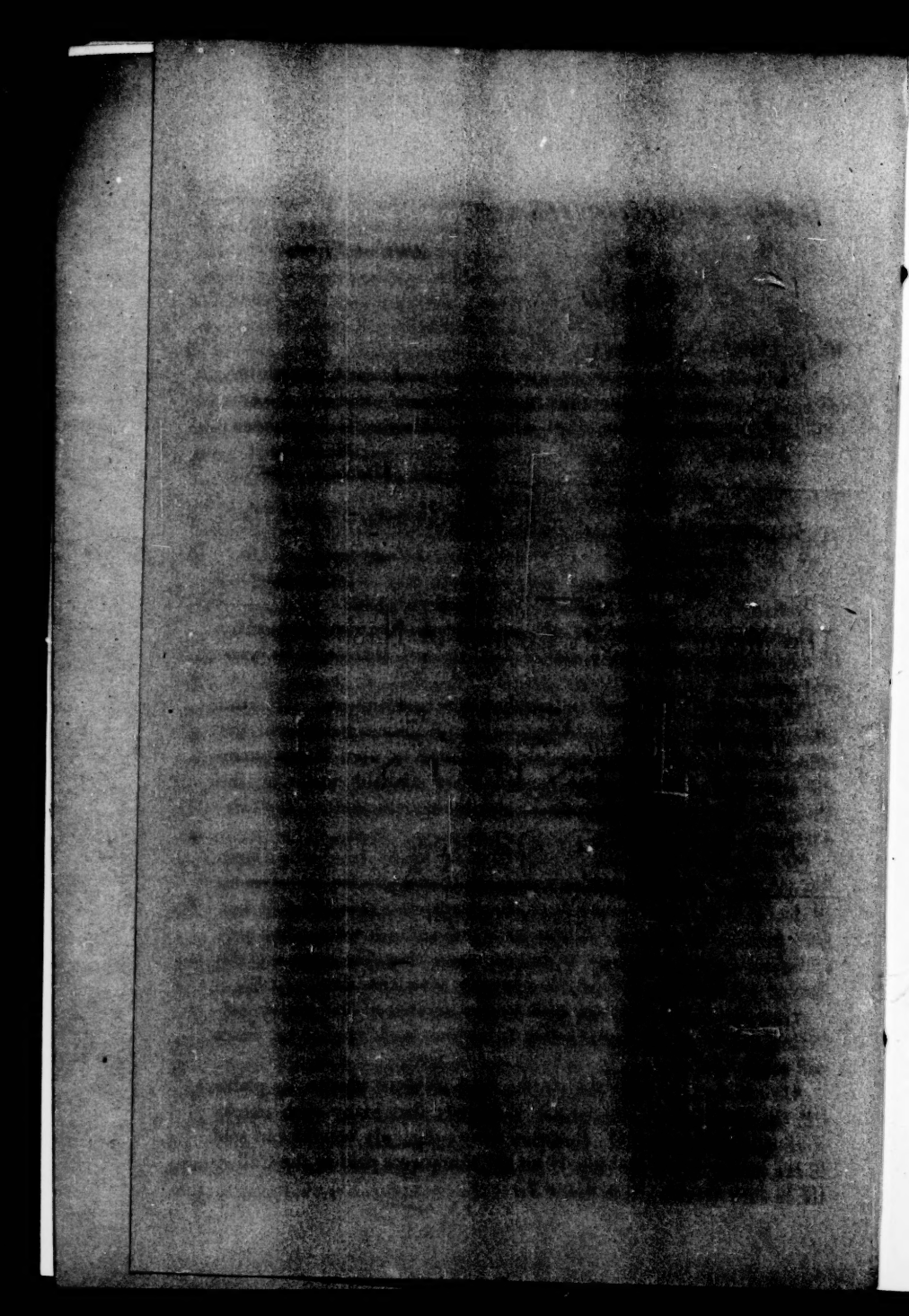
Plaintiffs in Error,

vs.

H. LINDSEY.

Argument of R. McP. SMITH, Counsel of Defendant in Error.

Brief Annexed.



The Mayor and City Council of Nashville,
vs.
H. Lindsey.
} *Writ of Error.*

May it Please Your Honors:

'The case under review was an action of *assumpsit*, brought to recover the contents of three instruments familiarly known in Nashville as "corporation-checks," of which the following is a specimen:

"$1000. No. 4810.

Nashville, March 10, 1869.

Treasurer of the Corporation of Nashville:

Pay to Henry Greener, or bearer, One Thousand Dollars on account of bills payable.

W. C. KINNEY, Mayor, *pro tem.* W. MILLS, Recorder."

Endorsed: "Thomas Magrane, Tr., March 10, 1869."

The Corporation plead that the instruments were not executed by it, nor by any person authorized to bind it; and also plead the general issue.

The plaintiff introduced in evidence the instruments. He also offered evidence to show that they bore the genuine signatures of the officers authorized by the corporate ordinances to sign checks upon the treasury; that the endorsements were actually made by the Treasurer, and that the seal affixed was the genuine seal of the Corporation. (p. 6.)

He also offered evidence to show that for many years it had been the custom of the Corporation to issue just such checks, in payment of debts, or to draw money from the treasury. Also, that it had been the custom when the checks were not paid upon their first presentation, for the Treasurer to endorse upon them his name and the date of presentation, and to allow interest from that date. (p. 6.)

Also, that it had been the well known custom of the proper collecting officers of the Corporation to receive such checks for taxes and other dues to it.

Also, that at the time the checks sued on were bought by plaintiff, the Corporation was largely indebted; that many such checks were outstanding unpaid; that they were commonly bought and sold in the market; and that nearly all the taxes were paid to the Collector in such checks. (pp. 6 and 7.)

Defendant attempted to show that the checks in suit did not appear from the corporate records to have been allowed by the City Council; but, as it did not propose to show that plaintiff had any notice of the want of such allowance, the evidence was excluded.

However, it was in evidence that these checks, with others, were issued as collateral security for a loan to the Corporation, of which half was delivered in cash and the other half in past due checks, the lender receiving the note of the Corporation for the amount, bearing legal interest, and receiving, to secure the payment of the note, checks calling for a larger amount than the note, it being expressed upon the face of the note that if it were not paid at maturity the holder might sell the checks, the note to be credited with the proceeds. It was also in evidence that the checks in suit were prematurely sold by the note holder to brokers at current rates—from seventy-five to eighty cents on the dollar. (pp. 7 and 8.)

It appeared that these loans were transacted by the Chairman of the Finance Committee. (p. 8.)

The by-laws of the Corporation were in evidence, by which the Recorder was directed to issue no checks except by authority of the City Council, or in pursuance of existing laws; it being, however, specially provided that the Water-Works Committee were to be allowed funds necessary in cases of emergency to keep the water-works in good repair and condition, and in active operation. (p. 9.)

It was in evidence that the City Council knew officially of the practice of issuing checks as collateral securities for loans, and that they made no objection thereto during several months while it was pursued. (p. 7.)

This was feebly attempted to be contradicted (p. 9); but the findings as to facts are not now under review.

It will be noted that no attempt was made to show that the City Council had not authorized the Chairman of the Finance Committee to borrow money, or that the formal *notes* given for the amount of the loans were not authorized. As to this, the reliance of the Corporation was upon its assumed incapacity to borrow money, as appears from its first requested charge (p. 10.): simply the collateral checks are assailed as unauthorized.

The sense of the Recorder, derived of course from his intimate knowledge of the action, formal and informal, of the City Council, whose secretary he was, appears on page 7. He testified that the checks in suit were issued *in the usual course of business.*

And, lastly, *no attempt was made to affect plaintiff with any knowledge that his checks were not issued with perfect regularity.* Plaintiff occupied then the position of a *bona fide* purchaser for value without notice. He found in the market certain instruments of the Corporation, of the character issued by it for many years in settlement of its dues. An inspection of its charter disclosed a thousand objects for which such instruments might be validly issued. He ascertained that the instruments were actually signed and countersigned by the officers charged with this duty by the corporate ordinances, and who had for many years continuously acted as the agents of the Corporation in the execution and issuance of such instruments. He saw that they were stamped with the corporate seal. He found that for many years uninterruptedly the Corporation had received such instruments for taxes, and that it was at that very time so receiving them and was, in fact, receiving for taxes scarcely anything else.

If he knew that the by-laws required that generally allowances by the City Council should precede the issuance of checks (which, however, there is no attempt to show that he *did* know), he also knew that for some purposes checks might issue without such allowances; and he knew that the Recorder, who was charged with the duty of issuing checks upon proper occasions, was constituted the secretary of the City Council, and the keeper of the minutes of their proceedings, and was therefore bound to know what allowances had been made, as well as bound to ascertain the existence of the other proper occasions when called upon to issue checks; and here was the Recorder's signature to checks which it was his duty not to sign except upon authority, the existence of which was a matter peculiarly within his own knowledge.

The checks were drawn upon the Treasurer, and they bore the Treasurer's genuine endorsement. Business precaution could not exact greater security without running into absurdity. And yet after plaintiff purchased the instruments, the Corporation denied that it had executed them or was liable upon them.

The Court charged the jury that the Corporation under its charter had power to issue promissory notes and other securities for lawful debts, and that the instruments aforesaid, if signed by the proper officers or agents, and given for a good consideration, were legal and obligatory upon it.

Also, that if by long continued usage such instruments had been signed and issued by the officers who signed and issued those in suit,

then these officers, the Mayor (and in his absence the Chairman of the Street Committee, acting in his stead under the ordinances of the Corporation), the Recorder, and the Treasurer, were the agents of the Corporation for this purpose, and competent to bind it by these instruments. That a corporation, unless restricted as to manner by its charter, may, by holding out to the public officers as clothed with certain powers, become bound by their acts within the scope of the powers usually exercised.

It will be noted that here not only had the officers in question been for many years continuously held out to the public as clothed with the powers involved, but also that they *were* all the while actually so invested by the corporate by-laws.

The Court further charged that even if the officers who signed and issued the checks had no right to do so without a previous allowance by the City Council, of the accounts for which they were given; yet, unless plaintiff knew that there had been no allowance, he might recover; since he had the right to presume the allowance of the accounts from the issuance of the checks by the officers whose duty it was not to issue without an allowance.

Also, that the Corporation had power to make the instruments in question, which were in legal effect promissory notes; and that, being signed by the officers who had for many years performed that duty, they were, if duly issued, obligatory.

That if it was the common practice of the Finance Committee, known to the Corporation, to pledge its checks as security for its notes, and the checks in suit were so pledged in conformity with this practice, then even if they were sold a few days after their date, and before the maturity of the note they were given to secure; yet, if plaintiff when he purchased them had no notice of such premature sale, *or of any irregularity in their issue*, he would be entitled to recover upon them.

I will maintain that in these rulings the Court kept safely within well established principles, reserving for supplementary notice such details of its contested action, in the admission and rejection of evidence and refusal of charges requested, as may not be sufficiently disposed of in the general discussion.

The stress of the contest below was against the position sustained by the Court, that even if the instruments in suit were issued without an allowance by the Council, and not in pursuance of existing laws, nor to meet the emergencies of the city water-works (the three regular

occasions of the issuance of such instruments); yet, being issued by the officers who had for many years acted as the agents of the City for this purpose, (and who were in fact charged with this duty by the ordinances of the City), plaintiff, if he purchased them in good faith, and without notice of any irregularity, was entitled to presume that the officers who issued them had done their duty—was justified in believing the representation as to compliance with the conditions of issuance, made by them in the very issuance of the instruments, and the City was estopped from repudiating the action of agents appointed and trusted by it, and thereby accredited to the public as worthy of confidence, and clothed with the power to deceive: that any loss arising from an unauthorized issuance must fall upon the City, from whose act in appointing and accrediting untrustworthy agents the loss emanated, and not upon the innocent purchaser, who relied upon the apparent conformity of the action of the agents of the City with the terms of their power, and was ignorant of the extrinsic fact, if any, peculiarly within their knowledge, which rendered this action a breach of duty upon their part.

But the City also excepted to the ruling of the Court, asserting its power to borrow money and to issue negotiable paper; to that holding that the execution and issuance of City warrants for many years by the officers who executed and issued those in suit would constitute evidence of their agency for this purpose; that a corporation unrestricted as to manner might, by holding out to the public officers as clothed with certain powers, become bound by their action within the scope of the powers usually exercised; and to the proposition that if it were the common usage of the Finance Committee, known to the Corporation, to pledge its checks as securities for its notes, then if those in suit were so pledged, even if they were afterwards sold prematurely, the purchaser without notice of this, or of any irregularity in their issue, would be entitled to recover upon them; and it also excepted to certain rulings during the trial, which are corollaries of the foregoing.

The charge that the performance for many years of certain functions by certain corporate officers might be taken as evidence of their agency in that regard, though unquestionably correct, was perhaps superfluous; since the by-laws of the City, antedating the instruments in suit, recognized the agency which might otherwise have been thus established.

I will now proceed to maintain the correctness of the views of the Court below, premising, however, that the case does not exact the establishment of the power of the City to borrow money; since conceding its absence, if the City might issue such instruments as those in suit for proper purposes, the holders of these, without notice to the contrary, might presume that they were so issued.

(1.) THE INSTRUMENTS IN SUIT WERE THE PROMISSORY NOTES OF THE CORPORATION.

Story on Promissory Notes, § 16: "If a person draws an order on himself, or payable by himself, it is, or at least may, although in form a bill, be treated as a promissory note. So an order drawn by A. B. as manager of a company, on the company, payable without acceptance to C. D. or order, may be declared on as a promissory note."

This was decided in *Miller vs. Thompson*, 3 *Man. & Gran.*, 576.

In *Clark vs. Des Moines City*, 19 *Iowa*, 208, the following instrument is pronounced a promissory note; the Court say, not a bill of exchange, because lacking the essential element of a distinct drawer and drawee:

No. 783—$8.00. DES MOINES, IOWA, Oct. 21, 1873.

To the Treasurer of the City of Des Moines:

Pay U. H. White or bearer eight dollars out of any moneys in the general fund not otherwise appropriated.

THOMAS CAVANAUGH, Mayor.

H. W. KING, Recorder.

In *Lyell vs. The Supervisors of Lapeer Co.*, 6 *McLean*, 447, the following instrument held to be virtually a promissory note:

LAPEER COUNTY, June 22, 1848.

$500. Receivable for taxes. No. 1,089.

Treasurer of Lapeer County:

Pay to G. Williams or bearer five hundred dollars. By order of the Board of Supervisors. WM. BEECH, Clerk.

G. A. GRIFFIN, Chairman.

The Court say, p. 453: "It is in effect a bill drawn by the County on itself, of which there need be no notice of dishonor. Notice is only necessary where knowledge is necessary to enable the drawer or endorser to take steps for his protection. The principle does no

apply where the drawer and drawee are identical." This virtually holds the instrument to be a note. But the question whether a note or bill was, of course, merely one of nomenclature; since the same principles governed, by whichever name the instrument was baptized.

In *Bull vs. Sims*, 23 *New York*, 570, an order drawn by the Mayor of the City of Milwaukee upon the Treasurer, and countersigned by the Clerk, payable to the order of E. Sims, was held to be a negotiable promissory note.

In *Fairchild vs. The Ogdensburgh, &c., R. R. Co.*, 15 *New York*, 337, it was held that an order by the President of the Company upon the Treasurer, directing him to pay to the plaintiff or order a specific sum for work done by him as a contractor, was a promissory note.

In *Campbell vs. Polk County*, 3 *Iowa*, 470, a county warrant drawn by the County Judge on the Treasurer, was held to be a promissory note.

In *Steel vs. Davis County*, 2 *G. Greene* (*Iowa*), 469, a similar warrant held to be a promissory note. The Court cite *Hasey vs. White Pigeon Beet Sugar Company*, 1 *Doug.*, 193, where an order by the President and Secretary on the Treasurer was held to be a promissory note, saying that it was a bill drawn by the Corporation upon itself, where the act of drawing was an acceptance, and that in legal effect that made it a note. On p. 472 the Court say: "The form of this order was the same as the one in this case, and the incorporation was rendered liable to be sued to no greater extent than our counties are, and still it was held that the order was in effect the same as a promissory note; that it must be understood to be a promise to pay the amount presently, an acknowledgement of an immediate and unconditional indebtedness."

In *Crawford County vs. Wilson*, 2 *English* (*Ark.*), 114, county warrants held to be negotiable instruments.

In *Justices vs. Orr*, 12 *Georgia*, 137, orders to payee or bearer, drawn by the Clerks of the Superior and Inferior Courts of Bibb County upon the County Treasurer, in favor of jurors, held to be negotiable.

In *Lucas, Turner & Co. vs. San Francisco*, 7 *California*, 462, warrants upon the Treasurer of the City, payable to bearer, were held void, because, say the Court, p. 477, they were negotiable on their face the same as bills or notes payable to bearer, and the charter of the City (Art. III, sec. 7) expressly prohibits the City from issuing

"any paper or device as a representative of value or evidence of indebtedness." The charter expressly withholding power to execute notes, instruments whose form necessarily made them notes, were held to be therefore void. They were void because they were promissory notes.

In *Kelly vs. The Mayor, &c., Brooklyn*, 4 *Hill*, 263, the following instrument held to be a negotiable bill of exchange:

No. 1,122. City of Brooklyn, ss.

DECEMBER 31, 1836.

To the Treasurer of the City of Brooklyn, at the Long Island Bank:

Pay Alex. Lyon or order fifteen hundred dollars, for award No. 7, and charge to Bedford Road assessment.

JOHN TROTTER, Mayor.

A. G. STEVENS, Clerk.

Sometimes it has been sought to take the warrant out of the category of negotiable instruments, by insisting upon a limitation for pay-payment to a particular fund. In the case just cited this attempt was made. But the Court held that whilst as between the Treasurer and the Corporation, the Bedford Road fund was the proper resource, and *that* "being exhausted, he no longer owed it as a duty to the Corporation to pay," yet the instrument, as between the Corporation and the holder, bound the former unconditionally.

In *Campbell vs. Polk County*, 3 *Iowa*, 470, the warrant was drawn "payable out of any money not otherwise appropriated," and it was urged that its office was merely to draw money out of the treasury—to serve as an authority to the Treasurer to pay, and as a voucher for him afterwards—and that the plaintiff ought to have averred and proved that there *was* unappropriated money in the treasury, and that *unless* there was, the warrant was not payable. But the Court said: "It is as clear to us as any proposition can be, that he should *not* be held to this." And they held the County liable unconditionally.

A more plausible case was presented in *Clark vs. Des Moines City*, 19 *Iowa*, 208. There some of the warrants were drawn "payable out of any moneys in the East-side Road fund not otherwise appropriated," and there was a provision in the charter of the City that there should be an East-side and a West-side Road fund, and that all moneys collected for road purposes on each side should be expended where collected. But the Court held that the reference in

the warrant to the particular fund was "not to express the idea that the obligation to pay was dependent upon a fund *in esse* at the time of demand or suit brought, but to enable the officers of the City to keep the accounts in the manner suggested." The Court added: "This is a matter which does not concern the creditors of the City," citing *Bull vs. Sims*, 23 *New York*, 570, where a warrant of the City of Milwaukee drawn payable "out of any funds belonging to the City not before specially appropriated," was held to be payable irrespective of the condition of the funds at the time of payment—to be payable *absolutely*—citing 15 *New York*, 337.

The instruments in question being promissory notes were, of course, endowed with the attributes of negotiability. Code of Tennessee, Sec. 1957, provides: "EVERY BILL, BOND, OR NOTE FOR MONEY, WHETHER SEALED OR NOT, AND WHETHER EXPRESSED TO BE PAYABLE TO ORDER OR FOR VALUE RECEIVED OR NOT, SHALL BE NEGOTIABLE IN THE SAME MANNER AS PROMISSORY NOTES."

The cases of *Lucas, Turner & Co. vs. San Francisco*, 7 *Cal.*, 462 (already cited), and *Bayerque vs. San Francisco*, 1 *McAll*, 175, were cited below as authorities for the position that, upon general principles, warrants like those in suit were not negotiable, even to the extent of enabling the transferee to sue upon them in his own name. But a very slight investigation will disclose that these cases support no such proposition.

Upon p. 477 of the first mentioned report, the Court say, as we have seen, that the similar instruments under consideration were void, because they were negotiable "in the same way as a bill or note payable to bearer," and "the different provisions of the charter show that the City had no power to issue such paper." The Court add: "But this intention may seem not so evident upon a hasty examination of the charter. If, however, we take the charter as a whole, and give force and effect to all the different provisions. we shall then be able to ascertain its true intention.

"The seventh section of the third article contains this general restrictive clause: 'The Common Council shall have no power to issue or put in circulation any paper or device as a representative of value or evidence of indebtedness. But this section shall not be construed to prohibit the auditing and certifying of accounts by the proper officers of the City, but no such audited accounts shall draw interest.'

"The latter part of the seventh section, that the prohibition should

not extend to the auditing and certifying accounts by the proper officers to the City creditors, would seem to designate clearly the character of the paper the City was authorized to issue. These audited and certified accounts were not negotiable, and could not draw interest. Warrants can be drawn under the provisions of sec. 8; but to give due and practical effect to the prohibitory provision contained in the 7th section, they should not be negotiable, and can not draw interest. They should be drawn payable to the party entitled to them, and not to him or bearer."

The case in 1 *McAll*, 175, was also a suit on San Francisco warrants negotiable in form. Not being negotiable, however, on account of the prohibition of the charter, and the original payee being a citizen of California, the non-resident transferee, of course, could not maintain his suit in the Federal Court. Such was the decision.

We see that these cases turned upon the prohibitory clause of the particular charter of San Francisco, and that, so far as they have any general significance, they cooperate with the numerous authorities already adduced, to show that the instruments in question are promissory notes.

(2.) THE CITY OF NASHVILLE HAD POWER UNDER ITS CHARTER TO ISSUE NEGOTIABLE PROMISSORY NOTES, FOR LEGITIMATE PURPOSES, AND TO BORROW MONEY.

As already remarked, the present case does not require me to maintain the power to borrow money. It has been considered not to be inseparable from the power to issue negotiable evidences of debt. In *Ketchum vs. City of Buffalo*, 14 *New York*. 336, Judge Selden regarded the latter power as a more conservative one than the former; and in *People vs. Brennan*, 39 *Barb.*, 522, it was held that the City of New York, authorized to establish markets, but forbidden to borrow money, might purchase on credit a site for a market and issue its bonds for the price.

But whilst the power of the city to borrow money was not essential to plaintiff's right to recover upon negotiable instruments, issued by it in reality to borrow money, but which he had no notice were so issued; yet, since this power, and that to issue negotiable instruments, may easily be established in connection with each other, and since one of the contested rulings below asserted the power, I will maintain the two powers together.

Ang. & Am. on Corp. § 257: "In general an express authority is not

indispensable to confer upon a corporation the right to borrow money, to deal in credit, or become drawer, endorser, or acceptor of a bill of exchange, or to become a party to any other negotiable paper. It is sufficient if it be implied as the usual and proper means to accomplish the purposes of its charter." Citing *Bank of Chilicothe vs. Chillicothe*, 7 *Ohio*, 31; *Kelly vs. Mayor, etc.*; *Brooklyn*, 4 *Hill*, 263, *&c., &c.* See also 2 *Kent*, 326, *note* (*a*), 9th edition.

In *Union Bank vs. Jacobs*, 6 *Hum.*, 525, the power of the Hiwassee Railroad Company to make a note was involved. In reply to the argument for a close construction of the charter, denying the power, the Supreme Court of Tennessee say:

"The restriction contended for is too refined and technical. It might have suited the days of the Year Books, when it was held that a corporation could contract for nothing except under its corporate seal, but it is strange that it should be urged at this day of enlightened jurisprudence, when the substance of things is looked to rather than forms. A corporation is, in the estimation of law, a body created for special purposes, and there is no good reason why it should not, in the execution of these purposes, resort to any means that would be necessary and proper for an individual in executing the same, unless it be prohibited by the terms of its charter, or some public law from so doing.

"There is no principle which prevents a corporation from contracting debts within the scope of its action; and, as has been observed, if it may contract a debt, it necessarily may make provision for its payment, by drawing or endorsing or accepting notes or bills;" p. 525.

In 2 *Coldwell*, 654, the same Court quote the language of the case just cited, and apply it to the construction of the charter of the City of Memphis.

In *Mills vs. Gleason*, 11 *Wis.*, 470, the Court held that, "When the charter of a municipal corporation confers power to purchase fire apparatus, cemetery grounds, &c., and to do many things, for the execution of which, money would be a necessary means, it would, in the absence of any positive restriction, confer the power to borrow money as an incident."

In reply to the argument that the passage of acts at various times by the Legislature authorizing municipal corporations to borrow money for purposes clearly municipal, assumed the necessity of

such acts to justify the borrowing; since the Legislature would not pass superfluous acts; the Court say that, whilst this is entitled to consideration, it is by no means conclusive. They add: "We think that, owing to the peculiar nature of the subject matter, in cases involving a loan by corporations, this argument is of less force than in almost any other. For capital is of a timid, jealous disposition. It delights in certainty, and is alarmed by doubts. It has been held with great strictness that corporations can exercise no powers except those granted by their charters. When, therefore, the charter does not *expressly* give the power of borrowing money, even though it grants powers to which this might be claimed as an incident, yet there is room for doubt, a chance for an argument; and, that being so, it might, as a matter of policy, facilitate the loan, to remove all uncertainty by an express act of the Legislature. And the fact that such acts have been passed, being then clearly necessary, when these corporations have been authorized to issue bonds in aid of purposes *outside* of their charters, may have had a tendency to induce a resort to the same practice; when the bonds were issued for some purpose, authorized by the charter; though, in *that* case, such legislation may not have been necessary.

"For these reasons, we think there is nothing in this practice sufficient to overthrow the general rule that, in the absence of restrictions, a corporation authorized to contract debts, and execute undertakings requiring money, may borrow for those purposes, and issue its bonds and other obligations therefor." Citing *Ketchum vs. Buffalo*, 14 *New York*, 356.

In reference to the remarks of Judge Selden in that case, on pp 365-6, as the supposed dangers of the abuse of the power to borrow money, the Court say:

"The opportunity of misapplying the funds must exist under any method of executing the powers of a corporation. If one affords greater facility for it than another, the remedy is in restrictions by the Legislature, and the selection of honest and capable agents by the people. But it affords no ground to say that as a mere question of power, the corporation may not adopt the one method as well as the other; and it being established that a corporation may purchase upon credit such things as are necessary for the execution of its powers, we think it follows, necessarily, that it may borrow the money to pay for them, as that is one mode of purchasing upon credit." Citing

Clark vs. School District, 3 *Rhode Island*, 199; *Beers vs. Phœnix Glass Co.;* 14 *Barb.* 358, &c., &c.

In *State vs. Madison City*, 7 *Wis.*, 688, held that, under power to purchase burial grounds, the city might purchase them on credit and issue bonds for the money.

In *Ketchum vs. Buffalo*, 14 *New York*, 356, held, as already stated, that, under the power to establish markets, the city might purchase a site upon time, and issue its bonds for the price. On page 363, the Court say: "The power of corporations in general to make contracts, and incur debts in the prosecution of their legitimate business, and to give their promissory notes for such indebtedness, would seem to be firmly established not only by universal practice, but by repeated judicial decision," citing authorities.

In *People vs. Brennan*, 39 *Barb.*, 522, held that the city of New York, although incapable of borrowing money, might, under the power to establish markets, purchase a site and issue its bonds for the price.

In *Bank of Chilicothe vs Chilicothe*, 7 *Ohio*, 358, the power to borrow money deduced from the power to repair the streets.

In *Clark vs. School District*, 3 *Rhode Island*, 199, held that the District had the implied power to give its note for a debt incurred in building a school-house.

In *Douglass vs. Virginia City*, 5 *Nevada*, 147, held that, the city having power to lease rooms for the accommodation of its Council, had power to agree that if the rent ($200 a month, payable monthly,) were not promtly paid, it would issue its notes to the lessor, for the amount in arrears, bearing five per cent interest per month. The Court said that a municipal, equally with a trading corporation, might, unless restrained by its charter, enter into any contract necessary to enable it to carry out the powers conferred upon it, such as incurring debts, executing and giving promissory notes, &c., &c.

In *Parsons on Bills and Notes*, p. 164, the doctrine is thus summed up: "In this country it may be regarded as settled, that the power of corporations to become parties to bills of exchange and promissory notes is *coextensive with their power to contract debts.* Whenever a corporation is authorized to contract a debt, it may draw a bill or give a note in payment. Every corporation may, therefore, become a party to bills and notes for some purposes. Thus a mere religious corporation may need fuel for its rooms and, as an econom-

ical measure, may buy a cargo of coal, and give its note for it, and such a note would undoubtedly be valid in this country."

Judge Dillon in his recent work on Municipal Corporations, reluctantly concedes the power to borrow money.—Section 81, and note to section 82, page 128.

Now the charter of Nashville contains no restrictions against borrowing money or issuing negotiables notes, and it abounds in powers to which these powers are clearly incidental. Let us glance for a moment at some of these.

The act of January 31, 1848, reducing into one act the various acts composing the charter of the city, and amending the same, among other powers, confers the following, (section 6, sub-sections as indicated). See compilation of City Laws, of 1868, page 3:

"3. To appropriate money, *and provide for the payment of the debts and expenses of the city.*

"5. To establish hospitals, &c.

"6. To establish a system of free schools, &c.

"7. To make regulations to secure the general health of the inhabitants, and to prevent and remove nuisances.

"8. To provide the city with water by water works, &c.

"9. To open, alter, abolish, widen, establish, grade, pave, or otherwise improve, clean, and keep in repair, streets, alleys, and sidewalks, or to have the same done.

"10. To erect, establish, and keep in repair, bridges, culverts, sewers and gutters.

"11. To provide for lighting the streets.

"12. To establish, support and regulate a night watch and patrol.

"13. To erect market-houses, establish markets, &c.

"14. To provide for the erection of all buildings necessary for the use of the city.

"15. To provide for enclosing, improving and regulating all public grounds belonging to the city, &c.

"16. To improve and preserve the navigation of the Cumberland River within the city, &c.

"17. To erect, repair and regulate public wharves, docks and landings, &c.

"24. To provide for the prevention and extinguishment of fires, &c.

"37. To pass all ordinances, not contrary to the Constitution an laws of the State, that may be necessary to carry out the full inten and meaning of this act, and to accomplish the object of their incorporation."

Section 12, act of February 18, 1858, (same compilation, pp. 10-11), add to previous powers the power to purchase, receive and hold, real and personal property within the city, and to sell, lease &c. the same; and to purchase, receive and hold real and personal property beyond the limits of the city, for a cemetery, for waterworks, for a hospital, a poor-house, a work-house, a house of correction, or for a public park or promenade, "or for any other purpose that the City Council may deem necessary and proper;" also, to sell, lease, or dispose of such property, &c.; "and to do all other acts touching the same as natural persons."

Surely it were superfluous to illustrate in detail the thousand occasions for contracting upon credit which must constantly arise in carrying out "*the full intent and meaning*" of these powers, in order to accomplish the objects for which they were bestowed. The power "to appropriate money and provide for the payment of the debt and expenses of the city," (sub-section 3), seems tantamount to a *direct* grant of the power to contract upon credit in the usual manner." Sub-section 1, had already granted the power "to levy and collect taxes" upon property, and sub-section 2, upon privileges. These, together with the power "to appropriate money," granted by the first clause of sub-section 3, would have sufficed for running the corporate machinery upon cash-paying principles. The remainder of the sub-section, "and provide for the payment of the debt and expenses of the city," clearly contemplates transactions upon credit. How was there to be any "debt," if the city could not go in debt, *i. e.* deal upon credit? And, then, power was given "to provide for the payment of the — *expenses* of the city,"—not by levying and collecting taxes and appropriating the money, for these powers had previously been given; the only other manner is by contracting upon credit.

And then the language of sub-section 37,—the *tone* of the phraseology,—unmistakably bespeaks liberality of construction. Power is granted "to pass all ordinances, &c., &c., that may be necessary to carry out the *full* intent and meaning of this act," and that there may be no mistake as to the spirit of the grant," the Legislature add: "and to accomplish the object of their incorporation." In

McCulloch vs. Maryland, 4 *Wheaton*, 413, the word "necessary" is said to import "no more than that one thing is convenient or useful or essential to another." The Court add: "To employ the means "*necessary*" to an end, is generally understood as employing any means calculated to produce the end, and not as being confined to those single means without which the end would be entirely unattainable." This was here held to be the meaning of the word in the subsidiary grant of power in the Constitution of the United States. And in *Union Bank vs. Jacobs*, 6 *Hum.*, 523, the Supreme Court of Tennessee, citing this decision, intimate that a still more liberal rule should be applied in the construction of the powers of a corporation.

In *Commonwealth vs. Pittsburgh*, 34 *Penn., St.* 496, power of City to borrow money held to include power to give bonds or usual securities to the lender.

The opposite counsel conceded the foregoing position below as applicable to private corporations. Their language was: "Such corporations may borrow money and issue negotiable securities for corporation purposes. And the officers of such corporations may, under certain circumstances, bind their principals without express authority, and even against positive instructions. Citing *Farmers' Bank vs. Butchers' Bank*, 14 *N. Y.*, 623; *Merchants' Bank vs. State Bank*, 10 *Wal.*, 604.

They added: "The principle which underlies these decisions is that private corporations, when once created, are like individuals, and may exercise the ordinary powers of individuals in carrying out the purposes of their organization."

Then, after citing the passage from Ang. and Ames., on Corporations, Sec. 257, already quoted by me, they proceeded: "The learned author adds in the same section, 'Where, however, the drawing, endorsing or accepting such bills is obviously foreign to the purposes of the charter, or repugnant thereto, the act becomes a nullity, and not binding on the corporation.'" They added: "Thisqualification (a bald truism) is very material in view of the purposes of municipal corporations, &c., &c. The purpose of a municipal corporation is *governmental*. The purpose of a private corporation is individual gain. The corporators of a municipality elect their officers for a term of office, to discharge functions of a public nature, and strictly analogous to those of officers of government. . . . . It is dif-

ficult to conceive of a public corporation, created for *governmental* purposes, where the borrowing of money or the execution of negotiable securities is not foreign to its purposes, or repugnant thereto. Ordinarily, the money raised by taxation and orders upon the treasury, are the only modes of raising or paying money necessary or proper for such corporations. Express authority from the Legislature seems essential to authorize a resort to any other mode." They next stated that the Supreme Court of Tennessee in *Union Bank vs. Jacobs*, 6 *Hum.*, 515, declared the foregoing doctrine as to private corporations. "But," they added, "it does not follow that this doctrine either has been, or ought to be, applied to municipal corporations;" as if the counsel were wholly innocent of the knowledge that in 2 *Coldwell*, 654, the Supreme Court of Tennessee had applied this very case (quoting the exact language in all its generality, embracing all corporations,) to the deduction of implied powers from the charter of Memphis. The language of the Court (with reference to the Corporation of Memphis) is: "A corporation is in the estimation of law a body created for special purposes, and there is no good reason why it should not, in the execution of these purposes, resort to any means that would be necessary and proper for an individual in executing the same, unless it be prohibited by its charter or some public law from so doing;" these being the very words of the Court in *Union Bank vs. Jacobs, on page* 515 *of* 6 *Hum.* In the same case, in construing the charter of Memphis, the Court cite *White Water Valley Canal Company vs. Vallite*, 21 *How.*, 424.

In *Kelly vs. Mayor, &c., Brooklyn*, 4 *Hill*, 263, the Court in support of the proposition: "Independently of any statutory provisions, a corporation may issue negotiable paper for a debt contracted in the course of its proper business," cite *Moss vs. Oakley*, 2 *Hill*, 265, where it was held that the Rossie Lead Mining Company might issue such paper. The authorities take no distinction between municipal and private corporations, as such.

In support of the principle that corporations are bound by the acts of their agents, though not empowered under the corporate seal, and that they may be bound by implications from the acts of their agents, *Ang. & Am., Sec.* 237, cite a legion of cases, embracing indiscriminately those of public and private corporations:—*Bank of Columbia vs. Patterson's adm'r.*, 7 *Cranch*, 305; *Mechanics Bank of Alexandria vs. Bank of Columbia*, 5 *Wheat*, 326; *Dunn vs. Rector of St. Andrews' Church*, 14 *John.*, 118; *American Insurance Company*

us. Oakley, 9 *Paige*, 496; *Overseers North Whitehall vs. Overseers South Whitehall*, 3 *Serg. & Rawle*, 117; *Legrand vs. Hampden Sydney College*, 5 *Mun.*, 324; *Inhabitants 4th School District vs. Rumford*, 13 *Mass.*, 193, *Sanger vs. Inhabitants Third Parish Roxbury*, 8 *Mass.*, 265; *Gassett vs. Andover*, 21 *Vermont*, 102, *San Antonio vs. Lewis*, 9 *Tex*, 69.

In support of the principle that: "Not only estoppels technically, but estoppels *in pais*, operate both for and against corporations," the same authors, *Sec.* 238, *note* 3, cite *Inhabitants Mendham vs. Losey* 1 *Penning*, (*N. J.*) 347; *Inhabitants Township Saddle River vs. Colfax*, 1 *Halst.*, (*N. J.*) 115, *Baptist Church vs. Mulford*, 3 *Halst.*, 191; *Powell vs. Trustees Newburgh*, 19 *John.*, 284; *Chestnut Hill and Spring-House Turnpike Co. vs. Rutter*, 4 *Serg. & Rawle.*

In support of the principle, with which I will deal by and by, that the principal is estopped to dispute the agent's representations as to extrinsic facts peculiarily within his knowledge, where the act was in apparent conformity with his authority, the Court of Appeals of Virginia, in *De Voss vs. City of Richmond*, cite and apply *Farmers' & Mechanics' Bank vs. Butchers' & Drovers' Bank*, 16 *N. Y.*, 128; *Exchange Bank vs. Monteath*, 26 *N. Y.*, 505; *Griswold vs. Haven*, 25 *N. Y.*, 597 (case of individuals), *N. Y. & N. H. R. R. Co., vs. Schuyler, &c.*, 34 *N. Y.*, 30; *British Royal Bank vs. Tarquand*, 6 *El. & Bl.*, 327; *Prince of Wales Life and Educational Assurance Co. vs. Harding, Ellis Blackburn & Ellis*, (96 *Eng. Com. Law R*), 183.

In *Ketchum vs. City of Buffalo*, 14 *N. Y.*, 363, Judge Selden appears to have been in blissful ignorance that there was a mysterious inapplicability of private corporation cases to public; since he cites and applies such cases to show that the City of Buffalo possessed the implied power to execute negotiable bonds. Hear him:

"But admitting that the City had a right to make the purchase, it is denied that it could purchase upon credit, and execute the bond given for the purchase money. The power of corporations in general to make contracts and incur debts in the prosecution of their legitimate business, and to give their promissory notes for such indebtedness, would seem to be firmly established, not only by universal practice, but by repeated judicial decision." Citing *Mott vs. Hicks*, 1 *Cow.*, 513; *Moss vs. Oakley*, 2 *Hill*, 265; *Kelly vs. Mayor, &c., Brooklyn*, 4 *Hill*, 263; *Moss vs. McCullough*, 5 *Hill*, 131; *Attorney General vs. Life and Fire Ins. Co.*, 9 *Paige*, 470; *McCullough vs. Moss*, 5 *Denio*, 567.

And not to pursue, as I might, these illustrations *ad infinitum*, this Court, in *Commissioners of Knox County vs. Aspinwall*, 21 *How.*, 545, cite and apply *British Royal Bank vs. Turquand*, 6 *El. & Bl.*, 327, as establishing that where the Board of County Commissioners were authorized to issue bonds after certain conditions precedent should have been fulfilled, the representation of the Board that they had been fulfilled, implied in their issuance of the bonds, estopped the County from denying this fact; and in *Supervisors vs. Schenck*, 5 *Wallace*, on page 782, the same Court cite *Bank of United States vs. Dandridge*, 12 *Wheat*, 70, and apply it to establish as to County officers that "where the officers of the corporation exercise powers affecting the interests of third persons, which presuppose a delegated authority for the purpose, and other corporate acts, subsequently performed, show that the corporation must have contemplated the legal existence of such authority, the acts of such officers will be deemed rightful and the delegated authority will be presumed."

As regards the power at present under discussion, the array of municipal corporation cases I have cited, directly in point, puts all question at rest; and we have seen that even Judge Dillon (who is a *vi et armis* curtailer of the powers of municipal corporations, and whose concessions of power come therefore with an *a fortiori*, like the admissions of an unwilling witness) concedes the power to borrow money, a less conservative power, according to Judge Selden, (*Ketchum vs. Buffalo*) than that to issue negotiable paper for legitimate corporate indebtedness. If the power to borrow money exists, then this is, of course, ONE of the legitimate purposes for which the paper may issue. The reasoning of the Supreme Court of Wisconsin in *Mills vs. Gleason*, 11 *Wis.*, 470, furnishes a conclusive answer to the argument that the powers in question are not incidental to the ordinary powers of municipal corporations, as well as the argument that the express grant of these powers by the Legislature, frequently made implies their absence when not expressly granted; and that drawn from the dangers of abuse.

In truth, it would have been difficult for any citizen of Nashville familiar with its charter, abounding in powers to which the powers of borrowing money and issuing negotiable obligations are clearly ancillary, and also familiar with the constant action of the City Government for years past until 1870, to hear without a smile of amusement the statement of the opposite counsel below, that it was difficult to conceive of a public corporation "where the borrowing of

money and the execution of negotiable securities were not foreign to its purposes." The case of *Clark vs. School District*, 3 *R. I.*, 199 (a mere *quasi* corporation) might have stimulated their conceptive faculties.

In arguing so elaborately in support of powers so clearly possessed, I may seem to resemble one who should turn loose a park of artillery upon a butterfly; but the latter portion of my remarks, with reference to the attempted distinction between municipal and private corporations, will be found to bear not only upon the positions immediately under discussion, but equally upon those remaining to be maintained. It was virtually conceded below that if the City of Nashville occupied in this case the same position as a private corporation, plaintiff was entitled to recover. Hence the struggle of my opponents to originate a broad line of difference between the two kinds of corporations.

The armory of precedents of narrow construction of implied municipal power, some of which were pressed into service below, consists of the cases of the *quasi* corporations of the books,—counties, townships, school districts, etc. These resemble complete municipal corporations, with elaborate charters like Nashville, about as zoophytes resemble vertebrates—the two classes having in common only the most generic attributes. And the difference between the decisions in the two classes of cases, is grounded, as we shall see, upon the points of difference between the two classes of bodies. I wish to make this difference clearly appear, and the citations I shall make will not only accomplish this purpose, but will establish that complete municipal corporations are, as to a certain class of their powers, regarded as *private* corporations; and, further, that in regard to the very powers involved in the present case, the City of Nashville is to be regarded and treated as a *private* corporation. The fallacy of the views quoted by me from the arguments of the adverse counsel below, will then appear to consist in this; that they argued from the nature of public bodies *entirely* governmental, and applied their conclusions to bodies *partly* governmental, but also partly *private* in their character; and private in respect to the very powers involved in the present case.

I quote first from *Cooley's Constitutional Limitations, page* 240:

"Thus far," says the author, "we have been considering general rules applicable to all classes of municipal organizations possessed of corporate charters by which those powers may be measured and the

duties which they impose defined. In regard to some of these organizations, however, there are other and peculiar rules which require separate mention. Some of them are so feebly endowed with corporate life, and so much hampered, controlled and directed in the exercise of the functions they possess, that they are sometimes spoken of as nondescript in character, and as occupying a position somewhere between that of a corporation and a mere voluntary association of citizens. Counties, townships, school districts, and road districts, do not usually possess powers under special charters, but they exist under general laws of the State, which apportion the territory of the State into political divisions for convenience of government, and require of the people living within those divisions the performance of certain duties as a part of the machinery of the State, and in order that they may be able to perform those duties, vest them with certain corporate powers. . . . . They are sometimes called *quasi* corporations, to distinguish them from corporations in general, which possess more completely the functions of an artificial entity."

Ch. J. Parker, of Massachusetts, in speaking of school districts, has said: "That they are not bodies politic and corporate with the general powers of corporations, must be admitted; as the reasoning advanced to show their defective power is conclusive. The same may be said of towns and other municipal societies, which, although recognized by various statutes, and by immemorial usage, as persons, or aggregate corporations, with precise duties, which may be maintained by suits at law, yet are deficient in many of the powers incident to the general character of corporations. They may be considered under our institutions as *quasi* corporations, with limited powers coextensive with the duties imposed upon them by statute or usage, but restrained from the general use of authority which belongs to those metaphysical persons by the common law."

One peculiarity of this exceptional character is (see 7 *Mass.*, 187) that, having no corporate fund, and no legal means of obtaining any, each corporator is liable to satisfy any judgment obtained against the corporation. In *School District vs. Wood*, 13 *Mass.*, 192, the Court say that these entities are not strictly corporations, but only municipal bodies, and that it will not do to apply to them in all cases "the law of corporations."

These limited organizations are not held to so strict a liability for

acts of their agents as others in the possession of a full corporate life under a charter. *Cooley's Constitutional Limitations*, p. 247: "The reason which exempts these public bodies, etc., does not apply to villages, boroughs, and cities, which accept special charters from the State. The grant of the corporate franchise in these cases is usually made only at the request of the citizens to be incorporated, and it is justly assumed that it confers a valuable privilege. Larger powers of self-government are conferred than are confided to towns or counties, larger privileges in the acquisition and control of corporate property, and special authority is given to make use of the public highways, etc."

The author adds that in regard to the liability of these chartered municipalities for the use of their franchises, they stand on the same footing as private corporations, which, having accepted a valuable franchise, are held to contract by the acceptance for the performance of these duties. He further adds: "In regard to all those powers which are conferred upon the corporation not for the benefit of the general public, but of the corporators—as to construct works to supply a city with water, or gas-works, or sewers, and the like, the corporation is held to a still more strict liability."

Dillon on Municipal Corporations, p. 31, § 10, note: "The distinction, as it is usually drawn, between municipal corporations proper, such as chartered towns and cities, voluntarily organized under general incorporating acts, such as exist in a number of the States, and involuntary *quasi* corporations, such as counties, is clearly set forth by Brinkerhoff, J., delivering the judgment of the Supreme Court of Ohio in the case just cited (*Hamilton Co. vs. Highels*, 7 *Ohio, St.*, 109). 'Municipal corporations proper,' he observes, 'are called into existence either at the direct solicitation or by the free consent of the persons composing them, for the promotion of their own local and private advantage and convenience.' On the other hand, counties are, at most, but local organizations, which, for the purposes of civil administration, are invested with a few functions characteristic of a corporate existence, etc. . . . . A municipal corporation proper is created mainly for the interest, advantage, and convenience of the locality and its people; a county organization is created almost exclusively with a view to the policy of the State at large for purposes of political organization and civil administration, etc. . . . . With scarcely an exception, all the powers and functions of the county or-

ganization have a direct and exclusive reference to the general policy of the State, and are in fact but a branch of the general administration of that policy."

In the given case, it was sought to hold the County Commissioners liable as the agents of the county for damages arising from their neglect of certain official duties. The Court concluded: "We can not but think that County Commissioners are not agents or representatives of the county in any such sense or manner as to render the people of the county justly answerable for their neglect, even if the neglect be such as would create a civil liability against a natural person *or a municipal* or private corporation."

On p. 33 Judge Dillon says: "Many of the Courts have drawn a marked line of distinction between municipal and *quasi* corporations with respect to their liability to persons injured by their neglect of duty, etc. One reason often given for the distinction is that with respect to local or municipal powers proper (as distinguished from those conferred upon the municipality as the mere agent of the State), the inhabitants are to be regarded as having been clothed with them at their request, and for their peculiar and special advantage, and that as to such powers, and the duties springing out of them, the corporation has a private character, and is liable *on the same principles and to the same extent as a private corporation.*"

We shall see that that is the well established doctrine upon the subject, though, apparently, Judge Dillon dislikes to concede it.

In sec. 39 of his book he says: "It may assist to an understanding of the extent of legislative power over municipal corporations proper (incorporated towns and cities) to observe that these, as ordinarily constituted, possess, according to many Courts, a double character—the one governmental, legislative, or public; the other in a sense proprietary, or private. The distinction between these, though sometimes difficult to trace, is highly important, and is frequently referred to, particularly in the cases relating to the implied or common law liability of municipal corporations for the negligence of their servants, agents, or officers, in the execution of corporate duties and powers. On this distinction, indeed, rests the doctrine of such implied liability. In its governmental or public character the corporation is made by the State one of its instruments, or the local depositary of certain limited and prescribed political powers to be exercised for the public good on behalf of the State, and not for itself. In this respect it is assimilated in its nature and functions to a county

corporation, which, as we have seen, is purely part of the governmental machinery of the sovereignty which creates it. . . . . But in its proprietary or private character the theory is that the powers are supposed not to be conferred primarily or chiefly from considerations connected with the government of the State at large, but for the *private* advantage of the particular corporation as a distinct legal personality, and as to such powers and to property acquired thereunder, and contracts made with reference thereto, the corporation is to be regarded as *quoad hoc* a private corporation, etc."

Numerous cases are referred to in the note illustrative of these principles.

The double aspect of municipal corporations complete is well set forth in *Bailey vs. Mayor, &c., New York*, 3 *Hill*, 531, cited and approved in *Richmond vs. Long's Administrator*, 17 *Grat.*, 375; *Western Savings Fund Society vs. Philadelphia*, 31 *Penn. St.*, 175, &c.

The City of New York was sued for certain acts of the Croton Water works Commissioners, and the defense was that, in respect to its powers to build and conduct water-works, it was to be viewed in the character of a local government, not amenable to the principle of *respondeat superior*. And unquestionably, had this position been correct, this consequence would have followed. In 17 *Grat.*, 375, the municipal power involved was regarded as of a public character, and the city consequently held not liable. In *Hewson vs. New Haven*, 37, *Conn.*, 475; and in *Jewett vs. New Haven*, 38 *Conn.*, 368, the city was held not liable, because the powers involved were of a governmental character (9 *American Reports*); while in *Jones vs. New Haven*, 34 *Conn.*, 1, and in *De Voss vs. City of Richmond*, 18 *Grat.*, 338, the cities were, respectively, held liable because the powers involved were of a private character. So in *Weightman vs. Corporation of Washington*, 1 *Black*, 51.

In the New York case the Court said:

"The argument of defendant's counsel confounds the powers in question with those belonging to defendants in their character as a municipal or public body—such as are granted exclusively for public purposes to cities, counties, towns, and villages, where the corporations have, if I may so speak, no private estate or interest in the grant. As the powers in question have been conferred upon one of these public corporations, thus blending, in a measure, those conferred for private advantage and emolument, with those already pos-

sessed for public purposes, there is some difficulty, I admit, in separating them in the mind, and properly distinguishing the one class from the other, so as to distribute the responsibility attaching to the exercise of each. But the distinction is quite clear and well settled, and the process of separation practicable. To this end, regard should be had not so much to the nature and character of the various powers conferred, as the object and purpose of the Legislature in conferring them. If granted for public purposes exclusively, they belong to the corporate body in its public, political or municipal character. But if the grant was for the purposes of private advantage and emolument, though the public may derive a common benefit therefrom, the corporation, *quoad hoc*, is to be regarded as a private company. It stands on the same footing as would an individual or body of persons upon whom the like special franchises had been conferred. Suppose the Legislature, instead of the special franchise in question, had conferred upon the city, in the usual manner in which such powers are conferred upon private companies, banking powers, or a charter for a railroad, leading into the city, would it be doubted that they would hold them in the same character, and be subject to the same duties and liabilities? It can not be doubted that they would. These powers, in the eye of the law, would be entirely distinct and separate from those appertaining to the defendant as a municipal body. So far as to the charter thus conferred, they would be regarded as a private company." It was accordingly held that as the proprietor of the Croton Water-works, the City of New York must be contemplated as a private company.

In *City of Detroit vs. Corey*, 9 *Mich.*, 165, held that, as the owner of the sewers, the city was to be viewed as a private corporation.

If ever a municipal corporation wore the aspect of a sovereignty, that corporation was the East India Company. Yet in *Moodaliay vs. East India Company*, 1 *Brown's Chancery R.*, 469, it was held that this august, *quasi* sovereign body was, in some respects, to be regarded as a private corporation.

In 5 *Cal.*, 306, the Court say: "Although a municipal corporation has delegated to it certain powers of government, it is only in reference to these delegated powers that it will be regarded as a government. In reference to all other of its transactions, such as affect its ownership of property in buying, selling and granting, and in reference to all matters of contract, it must be looked upon and treated as a private person, and its contracts construed in the same manner

and with like effect as those of natural persons." See also 9 *Cal.*, 453.

The principle is tersely stated in *Lloyd vs. Mayor, &c., City of New York*, 5 *New York*, 369: "The corporation of the City of New York, possesses two kinds of powers,—one governmental and public, and to the extent they are held and exercised, is clothed with sovereignty,—the other private, and to the extent they are held and exercised, is a legal individual. The former are given and used for public purposes, and the latter for private purposes. While in the exercise of the former, the corporation is a municipal government; and while in the exercise of the latter, is a corporate legal individual."

In *Weightman vs. Corporation of Washington*, 1 *Black*, 40, already cited, on p. 51, this Court held that the duty there involved, "was imposed upon the defendants in consideration of the privileges and immunities conferred by the charter," recognizing the private aspect of the corporation.

And in *DeVoss vs. City of Richmond*, 18 *Grat.*, 338, a very elaborate decision, the very power to borrow money and issue bonds, was held to be one of those appertaining to the private aspect of the city. The following is the language employed:

"But the power to borrow money is bestowed primarily for the advantage and benefit of the city. It has no direct relation to the powers and duties of the city as a local government. It may be exercised in a particular case, with a view of the better execution of these powers and duties, but it is not essential to their execution. It involves no exercise of sovereign power over the persons or property of the citizens, but is such a power as may be exercised by a private individual, or by an ordinary trading or commercial corporation. Such a power is entirely distinct in contemplation of law, from those which are bestowed upon the city for public purposes only, and pertain to its functions as a local government, exercising for that purpose a portion of the sovereign power of the State. The city *quoad hoc* is a private corporation,"—citing *Moodalay vs. East India Co.*, 1 *Brown's Ch.*, 469.

The scantiness of the implied power conceded to the *quasi* corporations aforesaid, is on account of the faintness of their corporate life. They are mere skeletons. Yet in *Clark vs. School District*, 3 *R. I.*, 199, the case of one of them, to quote the language of Judge Bell in *Harris vs. School District*, 8 *Foster, N. H.*, 58, "of the most lim-

ited power known to the laws"—even here the power to issue a negotiable obligation was implied.

Thus, in *Goodnow vs. Commissioners*, 11 *Minn.*, 40, the Court deny the power to make paper negotiable so as to cut off equities, upon the express ground (p. 41) that counties "are mere *quasi* corporations, invested with corporate powers *sub modo* and for a few specific purposes, but deficient in many of the powers incident to the general character of corporations," implying that the power denied the mere *quasi* corporation *was* one of the powers incident to complete corporations.

Upon p. 43 the Court say that the New York decisions seem to deny to County Supervisors the implied power to make negotiable paper, citing 5 *Denio.*, 517; 35 *Barb.*, 136, *etc.*, adding that the decisions of this very State did concede the power in question to chartered municipal corporations, upon the ground that it was implied as the usual and proper means to accomplish the ends of their charters; further adding that this reasoning did not apply to *quasi* corporations; since this is not for *them* the usual or authorized means of executing the purposes of their enabling acts.

So in 9 *Indiana*, 224, it was held that the trustees of so limited a corporation as a congressional township had not the implied power of executing a promissory note, the denial of the power being placed upon the meagreness of the corporate structure.

We may then lay aside all the authorities as to a difference between municipal and private corporations drawn from the cases of these nondescript corporations. These establish a difference between *quasi* corporations and complete municipal corporations, but not between the latter and private corporations. We have seen that these *quasi* corporations have a purely governmental aspect, whereas municipal corporations with charters have a private aspect also, having many powers other than governmental granted to them as franchises for the benefit and convenience of the corporators as such, and in which the general public are not interested. In receiving these powers such corporations stand on the same footing as private corporations in accepting their franchises, being held thereby to contract for the performance of the duties involved. And as to these powers, municipal corporations are regarded and treated as private companies. We have seen also that the power to borrow money for corporate exigencies and to give negotiable obligations for the debt, is one of the private class of powers.

The truth is that the great mass of the transactions of a City consist of the exercise of this private class of powers. As to these, the Mayor, Recorder, and Council are analogous to the President, Secretary, and Directors of a railroad company. In their other aspect, they are Executive, Judiciary, and Legislature of a local government.

The opposite counsel cited below *Clark vs. Des Moines City*, 19 *Iowa*, 204; *Gould vs. Town of Sterling*, 23 *N. Y.*, 459, *etc.*, as authorities for the position that municipal corporations have no implied power to bind themselves by negotiable paper with all the attributes of negotiabity. The New York case has no sort of bearing upon this point; and on p. 214 of the Iowa case it is expressly waived, what was held being that certain *officers* of the City had no such implied power. I will refer to these cases more fully presently in reference to their bearing upon other positions, and hope to show that the Iowa case was badly reasoned, and its authorities misconceived or inapplicable. In his recent work on *Municipal Corporations*, sec. 403, Judge Dillon, who spoke for the Court in *Clark vs. Des Moines City*, somewhat abates his tone. He says:

"Ordinary city, county, and town warrants are in some respects different from bonds of the character just mentioned; and, in the author's judgment (implying that there is another opinion), the better opinion is that there is no implied power in the officers of a town, county, or city corporation to issue warrants or orders which shall be free from equities in the hands of holders; that the existence of such a power is not a necessary incident to those ordinarily granted, or to carry out the purposes of the corporation, and would be attended with abuse and fraught with danger."

Cities, counties, and towns, etc., are all clashed together here, notwithstanding the differences we have seen. In sec. 407, p. 396, the author relapses into positiveness again:

"The ordinary warrants of such corporations, it is clear, do not cut off equities." Note 1, to this section, contains the following:

"Board of Supervisors of a county have not power to issue bills of exchange: *Canal Bank vs. Supervisors*, 5 *Denio.*, 517. Nor have village trustees: *Lake vs. Trustees*, 4 *Denio.*, 520. Corporate city has the power: *Kelly vs. Mayor*, 4 *Hill*, 263. Compare 19 *Iowa*, 119—213. In *Inhabitants vs. Weir*, 9 *Ind.*, 224, the Court, per Stuart, J., said: In so *limited* a corporation as a congressional township the power to make promissory notes could hardly be implied."

In the case of *Goodnow vs. Supervisors*, 11 *Minn.*, 40, also cited

in this note, the Court note the difference between *quasi* corporations and complete municipal corporations, and also that the New York decisions concede to the latter, but deny to the former, the implied power to issue negotiable paper; and the Court add that the reasoning which establishes the power in the one case is inapplicable to the other.

It is strange that these cases should not have suggested to the author the distinction he wholly fails to mark. In *Clark vs. Des Moines City*, nearly all his authorities are drawn from *quasi* corporation cases. This is the only decision I have found that denies to such instruments as those in suit complete negotiability. And this, while p. 211, Judge Dillon expressly says: "In legal effect, they (the warrants of Des Moines City) are the promissory notes of the City," citing 3 *Man. & Grang.*, 576; 15 *N. Y.*, 337, etc.

He does not, nor do any of the *quasi* corporation decisions, rest the imputed absence of complete negotiability of the warrants involved upon their form, but upon the supposed want of power in those who executed them to bind the corporations involved, by completely negotiable promissory notes, or the absence of power in the corporation itself to execute them. The same reasoning would equally curtail of essential attributes of negotiability, or would invalidate, instruments in the usual form of individual promissory notes.

No reason is given why what are conceded to be, by virtue of their form, promissory notes, should, if authorizedly executed, be shorn of the most vital attributes of negotiability. Of course, if unauthorizedly executed, or if the corporation itself had no power to execute them, that is another matter, unless some ground of estoppel exists forbidding their repudiation, when executed in apparent conformity with power to issue. What mysterious influence prevents an instrument, executed by a city, in form a promissory note, from being completely amenable to the law of negotiable paper?

In the *Floyd Acceptances*, 7 *Wal.*, 678, citing *The United States vs. Bank of Metropolis*, 15 *Pet.*, 377, this Court say that "when an officer of the Government authorized to do so, accepted a draft in behalf of the United States, or one of the departments, the validity of the instrument could not be disputed in the hands of an innocent holder."

Can even the Nation be bound by rules from which a mere municipality is exempt? The notion is absurd.

Judge Dillon speaks, however, of "ordinary warrants." The record here shows that "for many years the custom of defendant

corporation had been to issue checks, in form the same or similar to said three checks (those in suit), in payment of debts, *or* to draw money from the city treasury." (P. 6, near bottom.) Also, that when not paid at once, it "had been the custom for many years" for the Treasurer to accept them by writing his name and the date on the back, and that interest was henceforth allowed upon them; and that, when it was known that there were no funds for their payment, it was usual to present the checks for such acceptance. Also, that when plaintiff purchased those in suit, the Corporation was largely indebted, and many such checks were outstanding, and that they were commonly bought and sold in the market, and nearly all the taxes were collected in them.

In other words, sometimes the instruments were meant as warrants; and sometimes as notes to secure payments for which the creditors expected to wait. And in the latter case, after acceptance by the Treasurer, to give currency in the market, and to designate a time from which to allow interest, the instrument was placed upon the footing of a note or bill, due on demand, with interest from date. The City preferred to give this form of note, for reasons of its own. The form is immaterial; since, in legal effect, the instruments are notes. These, then, are not "ordinary warrants;" and even Judge Dillon's *dicta* do not reach them.

And then, I presume, there was no such statute in Iowa as sec. 1957, Code of Tennessee, making "*every bill, bond, or note for money, whether sealed or not, and whether expressed to be payable to order or for value received or not, negotiable in the same manner as promissory notes.*"

For a conclusive reply to the argument, that the power to annex the essential attributes of negotiability to corporate paper is not necessary and proper to carry out other corporate powers, and that it is liable to abuse, I refer to the lucid reasoning of the Wisconsin Supreme Court, in *Mills vs. Gleason*, 11 *Wis.*, 470, already cited.

I conceive that I have now established that the instruments in suit are the negotiable promissory notes of the City of Nashville. Were they not otherwise so, sec. 1957 of the Code would make them so. But they are so by virtue of their form, aside from this. Also, that I have established the power of the City of Nashville to borrow money, and to execute, for proper purposes, paper with all the attributes of negotiability. In the course of the argument to establish these positions, the authorities cited have exposed the fallacy of the reasoning of my adver-

saries below, in directing against the implied powers of chartered cities arguments and authorities applicable only to *purely governmental quasi* corporations, the authorities cited by me showing incidentally what the opposite counsel ignore; that charted cities have their *private* as well as their public aspect; and that as to the powers and duties appertaining to the former aspect, they are viewed and treated as private corporations; and further showing that the powers involved in the present case belong to this class. A plentiful citation of cases has made it appear that no distinction is taken between municipal and wholly private corporations with regard to the application to both of the general principles of the law of corporations; the question in any case having reference not to the nomenclature of the corporation involved, but to the grants contained in its charter and the powers reasonably ancillary to the proper execution of these. I think we shall also see with equal clearness that in carrying out the powers belonging to a chartered city other than of a governmental character, its officers and agents are regarded and treated just as the officers and agents of a private corporation, and that their acts create precisely the same estoppels as similar acts of the officers and agents of private corporations. I pass to the next position held by the Court below.

(3.) A LONG CONTINUED USAGE OF THE EXECUTION AND ISSUANCE OF INSTRUMENTS LIKE THOSE IN SUIT, BY THE OFFICERS WHO SIGNED AND ISSUED THESE, WOULD BE EVIDENCE OF THEIR AGENCY FOR THIS PURPOSE.—A CORPORATION, UNLESS RESTRICTED AS TO MANNER, MAY, BY HOLDING OUT TO THE PUBLIC OFFICERS AS CLOTHED WITH CERTAIN POWERS, BECOME BOUND BY THEIR ACTS WITHIN THE SCOPE OF THE POWERS USUALLY EXERCISED.

Surely, there can be but little controversy here. In *Ang. & Ames on Corp.*, Sec. 284, the law is thus stated:

"In general, it may be laid down that not only the appointment, but the authority, of the agent of a corporation, may be implied from the adoption or recognition of his acts by the corporation or its directors."

And in 2 *Green., on Evid.*, Sec. 62: "In all matters of daily necessity, within the ordinary powers of its officers, or touching its or-

dinary operations, the authority of its agents (those of a corporation) may be proved as in the case of private persons."

And as to this, in Sec. 65: "The most numerous class of cases of agency is that which relates to affairs of trade and commerce, where the agency is proved by inference from the habit and course of dealing between the parties. This may be either such as to show that there must have been an original appointment, or a subsequent and continued ratification of the acts done; but in either case, the principal is equally bound. Having himself recognized another as his agent, factor, or servant, by adopting and ratifying his acts done in that capacity, the principal is not permitted to deny the relation, to the injury of third persons who have dealt with him as such."

And in *Story on Agency*, Sec. 55: "Where a clerk is usually entrusted to sign notes for his master, which are afterwards paid or recognized to be valid, he is presumed to possess a rightful authority to do so in other instances within the scope of the same business."

In *Olcott vs. The Tioga Railroad Co.*, 27 *New York*, 546, the President of the Corporation had been silently allowed for three years to purchase locomotives, and draw bills for the price purporting to bind the company. Afterwards, the directors resumed the charge of the road. When sued upon one of the bills drawn by the President, the company attempted to repudiate his authority to bind it. On page 557 the Court say: "By virtue of his office, if nothing further appeared in regard to his power, we think he would *not* have been authorized to purchase the locomotives, or to execute the bill. Those were the duties which belonged to the board of managers, and could only be conferred upon other officers or agents with their consent." But on pages 558–9, they add: "The powers of the agent of a corporation are such as he is allowed by the directors or managers of the corporation to exercise, within the limits of the charter; and the silent acquiescence of the directors or managers may be as effectual to clothe the agent with power as an express letter of attorney." Citing *Bank of U. S. vs. Dandridge*, 12 *Wheaton*, 64; *Mellege vs. Boston Iron Co.*, 5 *Cush.*, 175; *Bridenbecker vs. Lowell*, 32 *Barb.*, 18; *Perkins vs. Wash. Ins. Co.*, 4 *Cow.*, 645; *Hoyt vs. Thompson's Exec.*, 19 *N. Y.*, 208.

See, also, *Abbott's Digest, Law of Corp.*, pages 5 and 6, sections 30, 31, 32 and 35, citing 17 *Ill.*, 40; 1 *Allen*, 34; 15 *John.*, 44; 1 *Hill*, 501, etc.

In *Exchange Bank vs. Monteath*, 17 *Barb.*, 171, held "The law will infer authority in an agent, as well from the general character of the acts which he has been permitted to perform as from a special written power."

In 1 *Allen*, 34, *Lester vs. Webb*, held that, if the Treasurer of a corporation was suffered to draw and accept drafts, indorse notes, etc., and to do other similar acts, whereby he was held out to the public as having the general authority implied from his official character, the corporation would be bound by his acts within the scope of his implied authority.

In *Bank of the United States vs. Dandridge*, 12 *Wheaton*, 70, (7 *Cond. Rep.*, 34), it was held by this Court that the same presumptions were applicable to corporations as to individuals. The Court say, with reference to the point directly involved in the case: "If officers of the corporation openly exercise a power which presupposes a delegated authority for the purpose, and other corporate acts show that the corporation must have contemplated the legal existence of such authority, the acts of such officers will be deemed rightful, and the delegated authority will be presumed. If a person acts notoriously as Cashier of a bank, and is recognized by the directors, or by the corporation, as an existing officer, a regular appointment will be presumed, and his acts as Cashier will bind the corporation, although no written proof is, or can be, adduced of his appointment. In short, we think that the acts of artificial persons afford the same presumptions as the acts of natural persons. Each afford presumptions from acts done, of what must have preceded them as matters of right or matters of duty."

In *Supervisors vs. Schenck*, 5 *Wallace*, on page 782, this Court cite and apply the case of *Bank of the U. S. vs. Dandridge;* not being aware of the novel discovery of the opposite counsel, that such principles as that in question are applicable only to *private* corporations—the corporation *here* being Marshall County, Illinois—a *quasi* corporation.

In the case of *The United States vs. Reeside*, mentioned in 7 Wallace, on pages 672-3, having been tried before Mr. Justice Baldwin, the learned Judge applied this principle even to the U. S. Government; holding that the Postmaster-General might have power to bind the Government by accepting bills, not granted by the letter of the law, but derived from the known usage of the Department.

In the *Floyd Acceptances*, 7 Wal., 666, it was held, however, that this principle was inapplicable to the Government.

The difference in this regard between the Government and a corporation, is broad. Regularly, the powers of a corporate agent would be conferred by some action of the directory, which might or might not be recorded. And the public are not, as we shall see fully hereafter, affected with notice of the records of corporations, private or municipal, except, as to the latter, of their governmental acts. The *public ordinances* of a city must, of course, be noticed, being the acts of *a local government*. They are *laws*. But its action in the administration of its corporate business—involving the exercise of powers *other* than governmental—in which only its corporators, *as such*, are interested—in regard to which it is viewed under the aspect of a private corporation—*this* part of its action the public have no more notice of than of the resolutions of the directors of a railroad company, unless some peculiarity of the charter otherwise provide. Now the appointment of an agent to carry out some purpose in the exercise of this class of functions, *e. g.*, to borrow money,—would regularly be made by a resolution of the strictly corporate—private—kind. But the U. S. Government has no *private* aspect. Its acts are all formal and *public*, and every one must notice them at his peril. The doctrine of Judge Baldwin erred in straining too far the partial resemblance between the Government and a corporation. If the Government is viewed as a corporation, then the Constitution must be its charter, and acts of Congress its resolutions. But the public must notice here as well the *resolutions* as the charter. In the case of a municipal corporation, the resolutions *other* than governmental need not be noticed.

The liberal modern rule as to modes of corporate action, superseding the ancient strictness, has grown largely out of estoppels forbidding denial of corporate resolutions,—unknown to the public even if passed and recorded,—authorizing acts done in behalf of the corporation, where these or similar acts have been recognized by the corporation as if justified by previous resolution.

The public have the right to presume the corporate resolution where the countenance of the acts by the corporation appears to presuppose it; but usage can never estop the U. S. Government from denying the authority of an agent, because such authority, if exist-

ent, must have been conferred by public statute, and every one is held to a knowledge of the statute.

The position under consideration has now, I take it, been abundantly established. It will, however, receive additional corroboration from what will be adduced in support of the next position, which, as formerly stated, will probably receive the stress of my adversaries' attack.

(4.) IF THE INSTRUMENTS IN SUIT WERE ISSUED BY THE OFFICERS AUTHORIZED TO ISSUE SUCH INSTRUMENTS UPON PROPER OCCASIONS, THEN THE PURCHASER HAD A RIGHT TO PRESUME THAT THEY WERE ISSUED UPON PROPER OCCASIONS; AND THE CITY OF NASHVILLE WAS ESTOPPED FROM CONTESTING THEIR VALIDITY IN HIS HANDS UPON THE GROUND THAT, ALTHOUGH HE WAS IGNORANT OF THE FACT, THEY WERE, IN REALITY, ISSUED UPON IMPROPER OCCASIONS.

The principle applicable here was the subject of a vigorous contest among the Judiciary of New York, beginning, I believe, with the decision in *North River Bank vs. Aymar*, 3 *Hill*, 263. A. had given B. a letter of attorney authorizing him to draw and endorse notes in the name and for the benefit of A. The notes in controversy were drawn in apparent conformity with this power, but in point of fact, they had no connection whatever with A.'s business, being given for the accommodation of third parties, who endorsed them to the bank where the letter of attorney was deposited. The bank receiving them in good faith, was held entitled to recover against A.

The principle of the decision, in the abstract, was, that where the act of the agent is in *apparent* conformity with the power, and whether it is in *real* conformity or not depends upon an *extrinsic* fact peculiarly within the knowledge of the agent, there persons dealing in good faith with the agent may safely confide in his representations as to the existence of such fact.

The decision was reversed in the Court of Appeals; but subsequently the decision of the Supreme Court was adopted by the Court of Appeals, and applied in frequent cases; and it is now the established law of the State. This decision is mentioned in 34 *N. Y.*, 68, (where it was applied), as a remarkable instance of a case "dis-

crowned by reversal, lifted to its feet and restored to authority by adjudication, ... established upon an impregnable basis after the remarkable warfare against it."

A similar decision is, *Putnam vs. Sullivan*, 4 *Mass.*, 45, (Parsons, C. J.) A member of a firm left his name with a clerk on pieces of blank paper, to be filled up and used by him in the renewal of notes of the house, when due in bank, etc. On some of the blanks, notes were to be written over the name, and on others the name was written on the back of the paper, so as to constitute an endorsement when a note had been written on the other side. A person obtained one of the latter blanks from the clerk, by false pretenses, and wrote and signed a note on the face of the paper, to the order of the apparent endorsers, and transferred this note to an innocent holder, and the apparent endorser was held liable.

The principle of these cases was adopted and applied by this Court in *Merchants' Bank vs. State Bank*, 10 *Wallace*, 644, etc. I can not do better than quote the precise language of the Court:

"Where a party deals with a corporation in good faith,—the transaction is not *ultra vires*,—and he is unaware of any defect of authority, or other irregularity, on the part of those acting for the corporation, and there is nothing to excite suspicion of such defect or irregularity, the corporation is bound by the contract, although such defect or irregularity in fact, exists.

"If the contract can be valid *under any circumstances*, an innocent party in such a case, *has a right to presume their existence*, and the corporation is estopped to deny them.

"This principle has become axiomatic in the law of corporations, and by no tribunal has it been applied with more firmness and vigor than by this Court.

"Corporations are liable for the acts of their servants while engaged in the business of their employment, in the same manner and to the same extent as individuals under like circumstances.

"Estoppel *in pais* presupposes an error or a fault, and implies an act in itself invalid. The rule proceeds upon the consideration that the author of the misfortune shall not himself escape the consequence, and cast the burden upon another.

"*Those who created the trust, appointed the trustee, and clothed him with the powers that enabled him to mislead, if there were any misleading, ought to suffer, rather than the other party.*

"In the *Bank of the United States vs. Davis*, Nelson, Ch. J.

said: 'The plaintiff appointed the director, and held him out to their customers and the public, as entitled to confidence. They placed him in a position where he has been enabled to commit this fraud.'

"The reasoning of Justice Selden in the *Farmers' and Mechanics' Bank vs. the Butchers' and Drovers' Bank*, is also strikingly apposite in the case before us. He said: 'The bank selects its teller, and places him in a position of great responsibility. Persons having no voice in his selection are obliged to deal with the bank through him. If, therefore, while acting in the business of the bank, and within the scope of his employment, *so far as is known, or can be seen, by the party dealing with him*, (the italics are the Courts,) he is guilty of misrepresentation, ought not the bank to be responsible?"

The same principle was applied in the *New York & New Haven Railroad Co. vs. Schuyler*.

"It was explicitly laid down by Lord Holt in *Hearn vs. Nichols*. He there said: 'For seeing somebody must be a loser by this deceit, *it is more reason that he that employs and puts trust and confidence in the deceiver should be a loser than a stranger.*'"

In *The Farmers' and Mechanics' Bank vs. The Butchers' and Drovers' Bank*, 16 N. Y., the teller had certified a check when the drawer had no funds upon deposit, having only a special power to certify when there were funds on hand. The bank was held liable. Judge Selden, who delivered the opinion of the Court (page 132), announced that he would "treat the case as one of an agency specially restricted," and would "simply inquire whether a *bona fide* holder, for value, of a negotiable check certified by a special agent whose authority is limited to cases where the bank has funds of the drawer in hand, can enforce payment of the check, provided the bank has no such funds." The Judge proceeded:

"This is a complex question, depending partly on the law of principal and agent, and partly upon that of negotiable or commercial paper. The defense assumes that principals are bound only by the authorized acts of their agents, and admits of no qualification of this general rule except where the agent has been apparently clothed with an authority beyond that actually conferred. But this proposition is too broad to be sustained. Principals have been repeatedly held responsible for the false representations of their agents, not on the ground that the agents had any authority, either real or apparent, to make such representations, but for reasons entirely different (citing

Hearn vs. Nichols, 1 *Salk*, 289). The principle of that case has never, I think, been overruled; but, on the contrary, has been repeatedly approved and confirmed. It will be found directly applicable to the present case. The certificate of the teller is a positive representation that the bank has funds to meet the check. If that representation is false, who ought to bear the loss? (Then follows the passage cited in 10 *Wallace*, 646). This conclusion is in no respect in conflict with that doctrine of the law of agency which makes it the duty of all persons dealing with a special agent to ascertain the extent of his powers. It is conceded that every one taking the checks in question would be presumed to know that the teller had no authority to certify without funds. But this knowledge alone would not apprize him that the certificate was defective and unauthorized. To discover *that*, he must not only have notice of the limitations upon the powers of the teller, but of the *extrinsic* fact that the bank had no funds; and as to this extrinsic fact, which he can not justly be presumed to know, he may act upon the representation of the agent. There is a plain distinction between the terms of a power, and facts entirely extraneous upon which the right to exercise the authority conferred may depend. One who deals with the agent has no right to confide in the representation of the agent as to the extent of his powers. If, therefore, a person, knowing that the bank has no funds of the drawer, should take a certified check upon the representation of the cashier, or other officer by whom the certificate was made, that he was authorized to certify without funds, the bank would not be liable. But in regard to the extrinsic fact, whether the bank has funds or not, the case is different. That is a fact which a stranger who takes a check certified by the teller can not be supposed to have any means of knowing. Were he held bound to ascertain it, the teller would be the most direct and reliable source of knowledge, and he already has his written representation on the face of the check. . . . . *I think it is a sound rule that where the party dealing with an agent has ascertained that the act of the agent corresponds in every particular, in regard to which such party has, or is presumed to have, any knowledge, with the terms of the power, he may take the representation of the agent as to any extrinsic fact which rests peculiarly within the knowledge of the agent, and which can not be ascertained by a comparison of the power with the act done under it.* The familiar case of the giving of a negotiable partnership note by one of the partners for his own individual benefit affords an apt illustration of this rule.

Each of the partners is the agent of the partnership as to all matters within the scope of the partnership business, and bind the firm by making, endorsing and accepting bills in such business; but he has no more authority than a mere stranger to execute such paper in his own business, or for the accommodation of others. If he gives the partnership note or acceptance for his own debt, it is void in the hands of any party having knowledge of the consideration for which it is given; but when negotiated to a *bona fide* holder, the firm is precluded from questioning the authority of the partners, and is effectually bound. The cases in this State by which this doctrine is illustrated and established, are numerous and uniform (citing authorities). . . . . The argument resorted to here, therefore, that the parties are only bound by the authorized acts of their agents, and that paper issued by an agent without authority is no more obligatory upon the principal than if it had been forged, is just as applicable to partnership notes given by a partner for his individual debts as to these certified checks. *The question is not, in such cases, whether the principal is bound by the unauthorized act of the agent, but whether he is estopped by the representation of the agent from disputing facts which show that the act was authorized.* There is no analogy between these partnership cases, or the case before the Court, and cases where the paper is *forged*. The fact of the agency, and the trust and confidence reposed by the principal in the agent, create a broad line of distinction between them; and it is this trust and confidence which constitute the foundation of the liability, and which justify the party dealing with the agent in relying upon his representation in respect to facts especially within the agent's knowledge. . . . . The principle is well stated in the following proposition, submitted to and approved by the Court in the case of *The North River Bank vs. Aymar*, 3 *Hill*, 262: 'Whenever the very act of the agent is authorized by the terms of the power; that is, whenever by comparing the act done by the agent with the words of the power, the act is in itself warranted by the terms used, such act is binding on the constituent as to all persons dealing in good faith with the agent. Such persons are not bound to inquire into facts *aliunde;* the apparent authority is the real authority.'"

On page 141, Judge Selden explains the difference between the case in hand and others where there was no privity of contract between the principal and the party misled by the agent; viz: that in the case in hand, the *negotiability* of the instruments involved

brought every holder, at whatever remove, into *privity* with the principal.

In *N. Y. & N. H. R. R. Co. vs. Schuyler et. al.*, 34 N. Y., p. 69, the Court discuss the principle of these cases, and apply it to the case under consideration, which involved the liability of the company for unauthorized issue of stock certificates, made, however, in apparent conformity with the powers of the agents, using the following language, pp. 69 and 70:

"In this case, in the narrow view in which we are now considering it, the condition upon which the agent could issue the certificates was a transfer in the books and the surrender of a previous certificate, if any had before been issued. These facts are wholly extrinsic, and peculiarly within the knowledge of the agent, as part of the special duties to be attended to by him, and were represented by him to exist, by the certificate itself. . . . The power conferred in these cases is of such a nature that the agent can not do an act, appearing to be within its scope and authority, without, as a part of the act itself, representing expressly, or by necessary implication, that the condition exists upon which he has the power to act. Of necessity, the principal knows this fact when he confers the power. He knows that *the person he authorizes to act for him on condition of an extrinsic fact which in its nature must be peculiarly within the knowledge of that person, can not execute the power without, as res gestæ, making the representation that the fact exists. With this knowledge he trusts him to do the act, and consequently to make the representation, which, if true, is, of course, binding on the principal.* But the doctrine claimed is that he reserves the right to repudiate the act if the representation be false. So he does as between himself and the agent, but not to an innocent third party who is deceived by it. The latter may answer: You intrusted your agent with means effectually to deceive me, by doing an act which in all respects compared with the authority you gave, and which act represented that an extrinsic fact, known to your agent or yourself, but unknown to me, existed; and you have thus enabled your agent by falsehood to deceive me, and must bear the consequences. The very power you gave, since it could not be executed without a representation, has led me into this position, and therefore you are estopped in justice to deny his authority in this case. By this I do not mean to argue that the principal authorizes the false representation. He only, in fact, authorizes the act which involves a representation which, from his confidence in the agent, he

assumes will be true; but it *may* be false, and the risk that it may be, *he* takes; because he gives the confidence and credit which enable its falsity to prove injurious to an innocent party."

The ground of the liability of the principal in the cases cited was not the negotiability of the paper, but the estoppel *in pais* arising from the representation of the agent employed and trusted by the principal, and thus enabled to deceive.

The only part subserved by the negotiability of the paper was to place the holder in *privity* with the principal whom it was sought to bind. See the explanation of Judge Davis on p. 72, in 34 *N. Y.* This was also explained by Judge Selden in the *Bank Teller* case already cited. See p. 141, 16 *N. Y.*

My adversaries were emphatic below in denying that a party assuming unauthorizedly to bind another as his agent, could succeed merely be the device of making the form of the instrument negotiable; as if any same person ever imagined that this was the case.

Even if a given transaction were *ultra vires* of the corporation itself, "where the circumstances are such that this presumption can not arise, as where the want of power is not apparent upon the face of the charter, but depends upon the existence of some extrinsic fact, known to the corporation but not to the party dealing with it," the corporation would be estopped from setting up that its act was *ultra vires*. Judge Selden's dissenting opinion in *Bissell vs. Michigan Southern Railroad Co., &c.*, 22 *N. Y.*, p. 304.

The majority opinion in the case took the broad ground that the corporation could never escape liability upon the mere ground of *ultra vires*. This seems to have been the opinion of the Supreme Court of Tennessee in regard to the *City of Memphis*, 6 *Cold.*, p. 661: "Now can the City take advantage of its direct want of authority in the charter if such was the case, or its own irregularities in executing the bonds? We think not. They must be held bound by their own acts. This doctrine is in harmony with both reason and authority."

Likewise the opinion of the Supreme Court of Ohio, in *Bank of Chillicothe vs. Chillicothe*, 7 *Ohio*, 358: "Although corporations have existed for centuries, we have found no case where inability to contract has been set up to avoid the payment of their debts. There are, it is true, many cases where the powers of particular corporations have been investigated and they have been held to have exercised powers not granted to them, in consequence of which their actions

were void. But there have been cases where the corporations themselves have been striving to set up or enforce powers; not where they have set up as a defense that they themselves had been guilty of a usurpation of power. As a general principle, no corporation can exercise powers not granted in the act of incorporation. This act is its constitution, and whenever it oversteps the limits therein prescribed, its acts become void. It is proper, too, that these powers should be strictly construed, considering with how little care chartered privileges are in these days granted. But a different rule of construction ought to prevail where a corporation is endeavoring to extend its power to the injury of others, or where it sets up, by way of defense to an action brought against it, that it has itself been guilty of a usurpation of power."

If, therefore, the city lacked power to borrow money, but had the power to issue instruments like those in suit for legitimate purposes, and they were in fact issued to borrow money, but the purchaser was ignorant of this; in such case he would be entitled to recover, upon either the broad or the narrow view of this matter.

To me the view of Judge Selden in dissenting, in 22 *N. Y.*, 304, appears the better; but the other appears to be the prevailing one.

Without stopping now to point out the application of the foregoing authorities to the case under discussion, I wish to cite several other pertinent decisions of this Court and of other Courts.

The decisions of this Court are: *Commissioners Knox Co. vs. Aspenwall*, 21 *How.*, 540; *Same vs. Wallace*, *Ib.*, 547; *Bissell vs. City of Jeffersonville*, 24 *How.*, 288; *Woods vs. Lawrence Co.*, 1 *Black*, 386; *Moran vs. Comm. Miami Co.*, 2 *Black*, 722; *Mercer Co. vs. Hackett*, 1 *Wal.*, 83; *Gelepke vs. Dubuque*, *Ib.*, 175; *Van Hostrop vs. Madison City*, *Ib.*, 291; *Meyer vs. City of Muscatine*, *Ib.*, 384; *Supervisors vs. Schenck*, 5 *Wal.*, 772; *Lee Co. vs. Rogers*, 7 *Wal.*, 181; *Amy vs. Pendleton Co.*, 13 *Wal.*, 298; *and City of Lexington vs. Butler*, 14 *Wal.*, 282.

In the first of these cases (21 *How.*, 540), the statute authorized County Commissioners to subscribe for railroad stock, and issue bonds in payment, after a majority of qualified voters, at an election duly held, should have voted therefor. The defense was that there had been no such vote. In other words, the Legislature had authorized the subscription to be made after a certain condition precedent should have been fulfilled, which had *not* been fulfilled. The Court said: "This view would seem decisive against the authority on the part of

the Board to issue the bonds, were it not for *a question that underlies it;* and that is, who is to determine whether or not the election has been properly held, and a majority of the votes of the county cast in favor of the subscription. . . . . The Court is of opinion that the question belonged to this Board. . . . . Another answer to this ground of defense is, that the purchaser of the bonds had a right to assume that the vote of the county, which was made a condition to the grant of the power, had been obtained, from the fact of the subscription by the Board to the stock of the railroad company, and the issuing of the bonds. The bonds, on their face, import a compliance with the law under which they were issued. . . . . The purchaser was not bound to look further for evidence of a compliance with the conditions to the grant of the power."

The Court proceed: "This principle was recently applied in a case in the Court of Exchequer Chamber, in England (6 *Ellis & Blackburn*, 327, *The British Royal Bank vs. Turquand*. It was an action upon a bond against the defendant as the manager of a joint-stock company. The defense was a want of power under the deed of settlement, or charter, to give the bond. One of the clauses in the charter provided that the Directors might borrow money on bonds, in such sums as should from time to time, by a general resolution of the company, be authorized to be borrowed. The resolution passed was considered defective. Jervis, Ch. B., in delivering the judgment of the Court, observed: 'We may now take it for granted that the dealings with these companies are not like dealings with other partnerships, and that the parties dealing with them are bound to read the statute and the deed of settlement. But they are not bound to do more. And the party here, on reading the deed of settlement, would find, not a prohibition from borrowing, but a permission to do so, on certain conditions. Finding that the authority might be made complete by a resolution, he would have a right to infer the fact of a resolution authorizing that which, on the face of the document, appeared to be legitimately done.' The principle we think sound, and it is entirely applicable to the question before us."

It was urged below that in the *Turquand* case the plea admitted the bond to be the act and deed of the corporation. The learned counsel preferred to cite the case from the report of the decision in the Queen's Bench (5 *Ellis & Blackburn*, 245), where something indistinct to this effect was said. But the Exchequer Chamber, in 6 *Ellis & Blackburn*, 327, on writ of error, do not rest the case upon any

such point. On page 332, they say that the plea, whether considered "as a confession and avoidance *or a special non est factum*," was insufficient.

And it is enough to note that this Court in 21 *Howard*, cite the decision and adopt the reasoning of the English Appellate Court.

The case of *The Prince of Wales Life and Educational Assurance Company vs. Harding*, (*Ellis, Blackburn & Ellis* 183,) was to the same effect. There the deed of settlement provided that the common seal should not be affixed to any policy except by order of three directors, signed by them and countersigned by the manager, and that every policy should be given under the hands of not less than three directors and sealed with the common seal. The policy appeared to have been regularly signed and sealed; but, in point of fact, the necessary previous order for the application of the seal had not been given. The case was elaborately argued. It was contended that the previous order of the three directors was a condition precedent to the power to affix the seal; that every one dealing with the company had notice that the directors were agents with limited authority, and notice of the limits of their power, and was therefore bound to see that the limits had actually been regarded. The previous order countersigned by the manager was the authority for the issuance of the policy. And it was a simple thing to ask for an inspection of this, as it would be in writing and deposited in the office where the party seeking to be insured would have to be present when he received his policy.

But the Court held that a person receiving a policy in good faith had a right to presume that the directors had obtained the necessary authority, and need not ask to see the authority.

In *Bissell vs. City of Jeffersonville*, 24 *How.*, 287, bonds were issued under a charter (see page 294) prohibiting this unless three-fourths of the legal voters should have petitioned the Council therefor. Upon page 299, the Court cite and apply *Commissioners Knox County vs. Aspenwall*, to the effect that the Council were to judge whether or not the petition had been made as required.

In *Moran vs. Commissioners of Miami County*, 2 *Black*, 722, upon pages 724–5, the Court again cite *British Royal Bank vs. Turquand*, 6 *El. & Bl.*, 327, quoting the passage already given, and applying it to the case before them, in which it was held that the bonds, reciting a compliance by the county officers who issued them, with the requirements of the statute authorizing their issuance upon the condition of

such compliance, the county was estopped from denying that this compliance in fact existed.

In *Mercer County vs. Hackett*, 1 *Wallace*, 83, the Legislature of Pennsylvania had authorized the Commissioners to issue the bonds "subject to the following restrictions, limitations and conditions *and in no other manner or way whatever;*" viz: after the subscription should have been recommended by a grand jury of the county, etc. The defense, among other things, was that there had been no such recommendation. The Court said: "We have decided, in the case of the *Commisioners of Knox County vs. Aspenwall*, that where the bonds on their face import a compliance with the law under which they were issued, the purchaser is not bound to look further. The decision of the Board of Commissioners may not be conclusive in a direct proceeding to inquire into the facts, before the rights and interests of other parties have attached; but after the authority has been executed, the stock subscribed, and the bonds issued, and in the hands of innocent holders, it would be too late even in a direct proceeding to call it in question.

In *Gelpcke vs. Dubuque*, 1 *Wal.*, 202, the Court say: "*When a corporation has power under any circumstances to issue negotiable securities, the bona fide holder has a right to presume they were issued under the circumstances which give the required authority.*"

In the subsequent case of *Same vs. Same*, *Ib.*, 221, it was objected that, the contract sued on being one for borrowing money, the complaint was bad, in not averring that the loan was sanctioned by two-thirds of the electors of the city, this being, under the charter, necessary to borrow money. But the Court said: "If the City could make such a contract with that sanction, the sanction will be presumed until the contrary is shown."

In *Meyer vs. Muscatine*, 1 *Wal.*, 384, the charter conferred power to borrow money if, at a regularly notified meeting, under a notice distinctly stating the nature and object of the loan, etc., the citizens determined in favor of the loan, by a majority of two-thirds of the votes given at the election. Defense, that the loan had *not* been thus authorized; but the City held liable, upon the principle of the previous cases.

In *Supervisors vs. Schenck*, 5 *Wal.*, 783, the Court again use the language I have quoted from *Gelpcke vs. Dubuque*.

In *Pendleton County vs. Amy*, 13 *Wal.*, 305, the Court say: "If the right to subscribe be made dependent upon a popular vote, the

officers of the county must first determine whether the vote has been taken as directed by law, and what that vote was. When, therefore, they make a subscription and issue county bonds in payment, it may fairly be presumed in favor of an innocent purchaser of the bonds, that the condition which the law attached to the exercise of the power had been fulfilled."

In *City of Lexington vs. Butler*, 14 *Wal.*, 282, the City refusing to subscribe because the necessary previous subscription by other parties had not been secured, was compelled by a mandamus to issue the bonds; but the mandamus was annulled by the Court of Appeals before the Railroad Company had transferred the bonds, and it was required to deliver them up by the Court of Appeals, and afterwards forbidden to transfer them by an injunction, and yet did transfer them; and since the bonds on their face purported to be issued in conformity with all the legal prerequisites, the *bona fide* holder of them was allowed to recover.

These cases are illustrations of the rule laid down in the New York cases previously cited, which was, as stated, approved by this Court in *Merchants' Bank vs. State Bank*, 10 *Wal.*, 644. The officials issuing the bonds were the agents of the cities and counties involved. The statutes in question conferred power to issue only in case a previous sanction should have been obtained. Whether this sanction had been obtained or not, was the extrinsic fact upon which depended the real conformity of the act of issuance with the power to issue. The fact was peculiarly within the knowledge of the corporate agents. Their issuance of bonds containing recitals that the necessary sanction had been given, was a representation of the existence of this fact. The purchaser looking to the statute conferring the power, and then to the bond issued in apparent conformity to the statute, and having no knowledge of a want of real conformity, was entitled to confide in the representation of the corporate agents as to the existence of the extrinsic fact—the vote, etc.,—upon which the real conformity depended. So in the English cases, the necessary previous resolution of the stockholders of the *British Royal Bank* in the one, and the requisite order for the application of the seal to the policy in the other, were the extrinsic facts peculiarly within the knowledge of the managing agents, upon the existence of which it depended whether their acts in the respective cases were in real conformity with the terms of their power. The representations

implied in acts whose validity presupposed their truth, were held to estop its denial by the corporate principals.

It is too obvious for serious contest, though it *was* contested below, that the relation of the city and county officers to their respective corporations in the cases cited was strictly analogous to that of the Mayor and Recorder of Nashville to their Corporation in the case now under consideration. The Commissioners of a county are not the county, nor are the Council of a city the city. The charter of Nashville provides: "Be it enacted, etc., That *the inhabitants* of the City of Nashville, as the same extends and is laid out, *are hereby constituted a corporation and body politic*, by the name and style of the Mayor and Aldermen of the City of Nashville, etc., (afterwards changed to the Mayor and City Council, etc.) *Act January* 31, 1848, *Sec.* 1.

Judge Dillon says, in *Clark vs. Des Moines City*, 19 *Iowa*, 209: "The body corporate is constituted of all *the inhabitants* within the corporate limits. The inhabitants are the corporators. The officers of the corporation, including the legislative or governing body, are *merely the public agents of the corporators.*"

County Commissioners and Supervisors, and City Councils, are merely corporate agents, the scope of whose agency is defined by the statutes creating and organizing the respective counties and cities. And the Mayor and Recorder of a city are also its agents within the limits of their powers under the charter, or by-laws validly passed. The City Council of Nashville are no more the Corporation than are the Mayor and Recorder. The *inhabitants* are the Corporation. The Council are *agents* for some purposes, and the Mayor and Recorder for others. The acts of *either* are acts of the Corporation when *within* the scope of their powers; and the acts of *neither* are the acts of the Corporation when *without* the scope of their powers.

The ambiguity of the term, the Mayor and City Council of Nashville, must not confuse the matter. This is the name of the *Corporation*, consisting of *the inhabitants;* and it is also the name of the *governing body* of this Corporation. The Mayor and City Council of Nashville in the one sense are to the Mayor and City Council of Nashville in the other sense, what the Governor and Legislature of the State are to the State. The Mayor and City Council of Nashville in the one sense are also to the Mayor and City Council of Nashville in the other sense, what the President and Directors of

a Railroad Company are to the stockholders. The acts of the Mayor and City Council of Nashville, *the agents*, are not the acts of the Mayor and City Council of Nashville, *the Corporation*, unless within the limits of their agency.

And so are the acts of the Mayor and Recorder the acts of the Corporation, when within the limits of *their* agency.

I wish to make this point perfectly clear, in order to show the fallacy of the attempt which will be made to elude the application of the decisions of this Court in the *Municipal Bond* cases, beginning with *Commissioners of Knox Co. vs. Aspenwall*, by contending that in those cases the Corporation itself acted, although irregularly; but that here only the officers have acted.

The corporations did not act in those cases immediately, but, if at all, only through their agents. These agents had not unlimited powers to act for the corporations involved, being in some instances mere County Commissioners or Supervisors, whose powers were extremely limited. And then in the particular cases the power to subscribe was carefully restricted and guarded by requirements of previous sanction. Without the grant of the power to subscribe, this power would not have existed. The agency to exercise this power was specially conferred by the act. The circumstance that the Legislature saw fit to select as the depositary of this agency the same persons who previously were the corporate agents for the ordinary corporate purposes is immaterial. The Legislature might have selected any other officers, or the same number of private citizens, to act as Commissioners for the purpose of taking the sense of the inhabitants and performing the corporate act of subscribing for the stock and issuing the bonds. If they selected, instead, the regular corporate authorities, these acted in the premises not by virtue of their previous official character, which related merely to the ordinary corporate purposes, but by virtue exclusively of their special selection for the particular agency in question.

Our Code, sec. 1142, etc., confers power upon municipal corporations to subscribe to railroads, etc., upon a petition filed, and the approbation of the voters obtained, at an election duly held. In *L. & N. Railroad Co. vs. County Court Davidson Co.*, 1 *Sneed*, pp. 680-1, our Supreme Court expressly say that the County Court acted in the premises purely by virtue of their special selection by the Legislature, who might just as well have selected any other county officers.

Nor, I repeat, must it be allowed to confuse the matter that the

name of the corporate agency selected for this new and extraordinary purpose may happen to be the same as that of the Corporation. The Mayor and City Council of Nashville—*the agents*—in the performance of the special duty of taking the sense of the Mayor and City Council of Nashville—*the Corporation*—consisting of the inhabitants,—subscribing for stock and issuing the bonds, act precisely as the Mayor and Recorder, or any other commissioners, would, had *they* been selected by the Legislature for this purpose. The one set of agents are no more the Corporation than the other. The Corporation is not bound by the act of any of these agents unless within the limits of the agency; or, if not within these limits, unless grounds of estoppel exist precluding it from setting up this fact.

And if these grounds *do* exist, they will as conclusively estop the corporate repudiation of the acts of agents called Mayor and Recorder, as of agents called Mayor and City Council. Neither does it matter that in the *Bond* cases the power to be exercised under conditions was conferred directly by the statute, and in other cases,—that under discussion, for instance—it was conferred by corporate action,—either by by-law or by holding out the officers to the public as clothed with the powers in question. The powers of corporate officers in some cases are conferred by the charter, and in others the powers merely of the corporation are thus conferred, and the corporation itself (as is the case to a considerable extent with Nashville) is left to apportion the carrying out of the corporate powers and duties among the various officials as it may think proper. It is immaterial whether the agent derives his powers directly from the charter, or some statute conferring an extraordinary power, or from the internal action of the corporation under the charter. In *either* case, the agent is equally bound to respect the limitations upon his power, and to comply with the prerequisites to its exercise. In *neither* case can the extrinsic fact upon which it depends whether the act is really in conformity with the power, be ascertained by comparing the act with the terms of the power; and as to this, in either case the representation of the agent may safely be taken if the fact is peculiarly within his knowledge.

Now the Mayor and the Recorder were the agents of the Corporation of Nashville for the purpose of issuing checks or warrants when an account had been allowed by the Council, or the exigencies of the Water-works required such provision, or some other emergency had to be thus met under existing laws. Whether either of these occa-

sions of issuance existed or not, was, assuredly, a fact *peculiarly* within their knowledge. No way appears in which either was made patent to the public. In *Clark vs. Des Moines City*, 19 *Iowa*, pp. 214–15, there was an express charter requirement that the record of all allowances should be "open to the inspection and examination of every citizen," and every warrant had to be allowed by the Council. We shall see, I think, that the public were not bound to examine such a book; but in the Nashville case there was *no such book to examine*. The transactions of the City in its corporate, *quasi*-private, capacity, are no more spread open to the public than those of a railroad company. This may be gathered from an inspection of the charter and by-laws. The corporate digest, which is required to be published, contains only *public* acts. This would only serve to give more complete assurance that the Mayor and Recorder were regularly the corporate agents to issue the checks. The issuance of a check by the Mayor and Recorder was conceded by my opponents to imply their representation that the proper occasion for its issuance had existed; as the execution of the bond in the *Tarquand* case implied that the necessary resolution had been passed; as the sealing of the policy in the *Insurance* case implied that the previous order of the Directors had been given; as the certifying of the check in the *Bank Teller* case implied that there were funds to meet it; as the issuance of the bonds in the *Aspenwall* case implied that the requisite majority vote had been properly obtained; and in the *Mercer Co.* case that the Grand Jury had made the recommendation required; as the execution of the note in the *North River Bank* case implied that it was in the business of the principal; as the note in 4 *Mass.*, 45, filled up on the inside of the blank previously endorsed, carried with it an implication that it was done for an authorized purpose; as an instrument in form a firm-note implies in *bona fide* hands that it was executed for partnership purposes.

This Court have held that a Board of Commissioners or Supervisor, or a City Council, empowered to issue bonds after such and such things shall first have been done, are thereby constituted the judges of this fact. If the Mayor and Recorder of a city are selected as the corporate agency in this regard, of course the same consequences will follow. If the Corporation is allowed to designate what officers shall hold the election, etc., and it shall designate the Mayor and Recorder, and provide that, in case they shall ascertain that the vote has

been favorable, then they may issue the bonds, of course the result will still be the same.

Now, in the present case, the Mayor and Recorder *are* selected to issue checks after such and such things shall have been done—after an allowance shall have been made—after it shall have been made to appear that the exigencies of the water-works require, etc., and the conclusion is perfectly inevitable that they are likewise constituted the judges of the facts authorizing the issuance of the checks.

Their act in issuing is in apparent conformity with the terms of their power,—equally with that of the agent in *North River Bank vs. Aymar*, 3 *Hill*, 263, where the authority was expressly confined to the issuance of notes connected with the principal's business, and the notes in controversy were issued for the accommodation of third parties, and had not the remotest connection with the principal's business. The public are ignorant of the extrinsic fact, known to the Recorder and Mayor, whether an allowance of the City Council, or the exigences of the water-works, or some other legitimate emergency, authorized the issuance; in other words, whether the instruments have really been issued within the business of the principal,—the City. The Recorder and the Mayor have for many years continuously been the agents of the City to issue the instruments in proper cases, and are expressly recognized by the by-laws as such agents, and the public are entitled to confide in their representations as to the extrinsic facts, of which they have been constituted the judges.

Suppose the instruments improperly issued. The City and the purchaser are both innocent. But the loss emanated from the act of the City in appointing unreliable agents and accrediting them to the public as trustworthy; and the City must bear the consequences of its own act.

No one will dispute the principle that one can not safely trust to the agent's representations as to the extent of his powers. If the Recorder and the Mayor, without such authority, should state that they were legally empowered to issue negotiable bonds, to fund the indebtedness of the City; neither their statement, nor the negotiable form of the bonds they might issue, would conclude the City. But suppose they *were* authorized to issue bonds for *this* purpose only, but that, after filling up several of the bonds, they should sell them for their own benefit, and embezzle the money; will any one deny that a *bona fide* purchaser might hold the City?

And if being authorized to issue for proper purposes instruments

in effect city notes, they issue some for improper purposes, would not the *bona fide* holder be equally entitled to recover?

As Judge Selden explains, in 16 *N. Y.*, on page 136: "The question is not in such cases whether the principal is bound by the unauthorized act of the agent, but whether he is estopped by the representations of the agent from disputing facts, which show that the act was authorized."

If the Recorder and Mayor should inform one contemplating the purchase of certain checks, that these had not been issued in pursuance of an allowance, or of any provision for corporate emergencies but should untruly add that they had been duly authorized to issue the checks for a given purpose; here the representation of the agent could not be safely taken, any more than the teller's in the *Bank Teller* case, that he was authorized to certify without funds; or the agent's in the *North River Bank* case, that he had been authorized to execute notes for his principal for mere accommodation purposes; but it is entirely different when the Recorder and Mayor assert that the checks have been issued in conformity with a power which does actually exist, and with which the issuance has been in apparent conformity. The representations of the agent can not be taken as to the terms of his power, but only as to the extrinsic fact upon which depends the real conformity of an apparently conformable act.

It behooves me now to advert to an authority much relied upon below,—where, indeed it's citations furnished my opponents with, perhaps, the greater part of their ammunition,—*Clark vs. Des Moines City*, 19 *Iowa*, 204,—in which the opinion of the Court was delivered by Judge Dillon, who has since published a text-book upon Municipal Corporations; in which, upon the points involved, substantially the same views are expressed.

The instruments here in suit were similar to those in the present case, and some of them had not been allowed by the Council.

Before criticizing this case. I would remark that the decision therein may be sustained upon grounds not affecting the merits of the present case.

On page 214, it appears that section eighteen of the charter of Des Moines City required every warrant to be allowed by the Council, and further required the action of the Council in making the allowance to be entered of record "on the journals of the city, which shall be open (so the charter declares), to the inspection and examination of every citizen." Now the charter of Nashville contains no similar

requirements. As to the action of the City in its corporate, *quasi*-private capacity, it is left to its own devices. And even the by-laws do not require all warrants to be allowed by the Council. They may be otherwise issued to meet the exigencies of the water-works, or "in pursuance of existing laws," for other corporate purposes. And there is no statutory requirement of a record to lie open to the examination of the public. Nor, in fact, is there any such record kept. The city business journals, etc., are no more public than the similar books of a railroad company.

If, therefore, the statutory requirement of a record of allowances to lie open to the public, where such allowances are the sole legitimate sources of origination, might be regarded as operative to confer constructive notice of what might be gathered from its inspection, as in the case of a registry of deeds under the registration laws; and if, therefore, in the *Des Moines* case the element was wanting of the agent's *peculiar* knowledge of the extrinsic fact upon which depended the real conformity of the act apparently conformable to the power; yet this is otherwise in the *Nashville* case, where there is neither such statutory requirement nor such means of knowledge.

But I do not think that even in the *Des Moines* case the purchaser *was* bound to resort to the municipal record. In the *Turquand* case the bondholder was held not to have been bound to call for an inspection of the resolution necessary to authorize the issuance of the bond. And this case was applied to that of *Knox Co.* (21 *How.*) by this Court, quoting as in point this language of the English Court: "Parties are bound to read the statute and deed of settlement. *But they are not bound to do more.* . . . . . Finding that the authority might be made complete by a resolution, he (the party concerned) would have the right to infer the fact of a resolution authorizing that which on the face of the document appeared to be legitimately done." This Court add: "The principle we think sound, and it is entirely applicable to the question before us."

So in *De Voss vs. City of Richmond*, 18 *Grattan*, 338. Here a bond of the city, belonging to a Massachusetts party, had been confiscated by a decree of the Confederate Court, which had ordered the City to issue a new bond, in lieu, to its Receiver. The Council complied, but directed its officer to make the new bond recite upon its face that it was issued in lieu of a confiscated bond. The bonds of the City of Richmond are not negotiable. They resemble certificates of stock rather than bonds. When sold, the vendor gives the vendee

the bond or certificate, with a power of attorney, under which a transfer is made on the proper book in the Auditor's office to the new holder; and the former certificate is surrendered and a new one issued to him. Thus the purchaser of a city bond may, when he obtains the transfer, readily trace the bond to its origin by reference to a municipal record required to be kept in the office. After a time the officer neglected to make the new bond recite its origin, and De Voss came to own it without any knowledge of this origin. It was urged by the City that De Voss must be regarded as affected with constructive notice of the origin of his bond, by means of this record. But the Court said: "All that can be said is that he might have ascertained the fact if he had gone to the Auditor's office and traced the bond back to its source. But that is not enough to charge him with constructive notice of what he might then have ascertained upon inquiry;" citing 2 *Rob. Pr.*, 29; 5 *Leigh*, 627. The Court added that it was not enough that through want of prudent caution De Voss neglected to inquire. He must have abstained in order to avoid knowledge. There must have been *willful blindness;* not mere want of caution; citing *Jones vs. Smith*, 1 *Hare R.*, 55; *Ware vs. Lord Egmont*, 31 *Eng. L. & Eq.*, 89.

The Court here cited the *Tarquand* case; also, *The Prince of Wales Life and Educational Assurance Co.* case, where the policy-holder was not required to call for the necessary written order authorizing the seal to be affixed.

Doubtless, in *Mercer Co. vs. Hackett* (1 *Wal.*), an examination of the county records would have disclosed the absence of the required recommendation of the grand jury.

Still, there is this broad difference between the *Des Moines* and the *Nashville* cases, that in the former the charter, which the purchaser must have noticed, apprised him that the warrants could not have been regularly issued without allowances, and that there was a record of allowances open to his inspection; while in the latter the charter gave no information whatever as to what the antecedents of a warrant must be, but left the purchaser to repose upon the long continued agency of the Recorder and the Mayor to issue such instruments, ratified by the constant reception of them for taxes; and even an inspection of the by-laws, if that were required (as it has been seen it was not), would only have corroborated this agency, and disclosed that there were other legitimate occasions for the issuance of warrants han an allowance by the Council. The purchaser would not have

been referred by such inspection to any record containing definite information as to all warrants outstanding, from which it could have been ascertained whether any given warrants were legitimately issued or not. I repeat, that *Des Moines* might well escape liability under circumstances which inevitably involve *Nashville*. But even *Des Moines*, with its statutory record open to the public, *should* not have escaped.

But it is evident that the *active* principle of the decision in *Clark vs. Des Moines City*, was the view of the law of agency entertained by the opposition in New York to the doctrine of the *North River Bank case*, which, at first, succeeded in reversing that case, but finally succumbed, leaving that doctrine established, as Judge Davis says, on page 68 of 34 *N. Y.*, upon an impregnable basis. The opposition view determined a number of cases before it was suppressed, including *Halstead vs. Mayor, etc., New York, in* 5 *Barb.*, 218, cited, of course, by my opponents.

But the Appellate Court disposed of this case in 3 *Comstock*, 430, without passing upon the questions decided below relevant to the present discussion. This opposition view is set forth in the dissenting opinion of Judge Comstock in the *Bank Teller case*, 16 *N. Y.*, pp. 143-158.

Judge Dillon missed the point of the argument for the warrant holder in the case decided by him.

Upon page 209, (19 *Iowa*,) he says: "If my name be signed to a promissory note by a person representing himself to be my agent, but without any authority from me, I am not bound; and I am no more bound because the obligation has been put into a negotiable form than if it had been put into a form not negotiable." And on page 210: "Negotiability will not validate obligations which are not binding because of a want of power to issue them." Citing *Starin vs. Genoa*, 23 *N. Y.*, 452; *Gould vs. Sterling*, *Ib.*, 464.

On page 210, he explains that an agency can not be established by the representations of the party assuming to be an agent.

On page 215: "A warrant issued by the Mayor and Recorder, without previous order of the Council is void. They have no authority to do it; it would be substantially a *forgery*,—the very fallacy dealt with by Judge Selden on page 136, of 16 *N. Y.*

On pages 217-18: "The true rule is that the want of corporate

power, or the want of authority in the municipal officers, can not be supplied by their unauthorized acts or representations."

No doubt, the positions which, by thus combating them, Judge Dillon impliedly imputes to the unsuccessful plaintiff's counsel, must have appeared very unreasonable to the Judge.

Here is what Judge Dillon plainly regarded as the good sense of the case, page 209:

"The body corporate is constituted of all the inhabitants within the corporate limits. The *inhabitants* are the corporation. The officers of the corporation, including the legislative, or governing body, are merely the public agents of the corporators. Their duties and their powers are prescribed by statute. Every one, therefore, may know the nature of these duties, and the extent of these powers. . . . . The corporation is bound only when its agents by whom, from the necessities of its being, it must act, if it acts at all, keep within the limits of their authority. . . . Not only so, but such a corporation may successfully interpose the plea of *ultra vires;* that is, set up as a defense its own want of power under its charter, or constituent statute, to enter into a given contract, or to do a given act, in violation, or in excess, of its corporate power and authority. The cases asserting these principles are numerous and uniform."

No intimation here of cases where the act, though really *ultra vires* is apparently otherwise, and the party dealing with the corporation is ignorant of the facts which make it *ultra vires;* no recollection of cases such as *Bank of Chillicothe vs. Chillicothe,* 7 *Ohio,* 358, where the Court said with equal positiveness: "Although corporations have existed for centuries, *we have found no case where inability to contract has been set up to avoid payment of their debts,*" or 2 *Coldwell,* 661, where our Tennessee Supreme Court say that the City of Memphis may not "take advantage of its direct want of authority in the charter;" or *Bissell vs. Michigan Southern Railroad Co.,* 22 *N. Y.,* 258, where *ultra vires* is broadly declared to be no defense against corporate liability.

In reply to Judge Dillon's superfluous demonstrations that principals can not be bound by the unauthorized acts of their agents, and that the Mayor and Recorder had no right to issue warrants unless ordered by the Council, might aptly have been quoted the language of this

Court in *Commissioners Knox Co. vs. Aspenwall*, addressed to counsel pressing similar arguments against the validity of action where prerequisites had not been complied with: "This view would seem to be decisive against the authority, etc., *were it not for a question that underlies it;*" or the language of Judge Selden in the *Bank Teller case*, page 136, of 16 *N. Y.*: "The question is not, in such cases, whether the principal is bound by the unauthorized act of the agent, but whether he is estopped by the representation of the agent from disputing facts which show that the act was authorized. There is no analogy between the case before the Court and cases where the paper is forged. The fact of the agency, and the trust and confidence reposed by the principal in the agent, create a broad line of distinction between them."

If we except the argument that the record of allowed warrants required by the charter of the City to be kept, precluded any peculiar knowledge on the part of the Mayor and Recorder of Des Moines of the fact of allowances, the reasoning of the Judge plays wholly upon the surface of the case. And it has been seen that this position is untenable.

I find another indication that Judge Dillon has failed adequately to grasp the full significance of the reasoning of Judge Selden in the *Bank Teller* case, or of this Court in the *Municipal Bond* cases, in note 1, to section 420 of his work on *Municipal Corporations*. He is discussing the principles involved in *Clark vs. Des Moines City; Gould vs. Sterling; Commissioners Knox County vs. Aspenwall*, etc.; and, directly in this connection, he cites *United States vs. City Bank of Columbus*, 21 *How.*, 356, as "a very *striking* illustration of the general principle that a corporate officer can not bind his corporation by his unauthorized acts or representations concerning the authority of himself or others."

In this case, the Cashier of the bank, without any authority, unless he possessed it *ex officio*, wrote to the Secretary of the Treasury that the bearer of the letter was authorized to contract for the transfer of money from New York to New Orleans; and this party and the Secretary contracted in the premises, and the bank was sued upon the contract. The Court, of course, held that the act of the Cashier not being authorized by the Directors, and not within "the ordinary course of his duties," was not binding upon the bank;—a plain case, and "*strikingly* illustrative" only of the presumption of Cashiers.

Now this citation, in the connection in which it occurs, and the remark accompanying it, give insight into the attitude of Judge Dillon's mind with regard to the *Municipal Bond* decisions of this Court, and the kindred cases. In the *Tarquand* case, applied by this Court in *Commissioners Knox County vs. Aspenwall*, it had been held that, since power to issue the bond involved might have been conferred by a resolution of the share-holders, the *bona fide* holder had a right to presume the resolution. In the *Knox County* case this Court held that the bond-holder had a right to presume the requisite majority vote which would have authorized the issuance. Consistency seemed to Judge Dillon to exact that the Secretary, in the *Cashier* case, should have been allowed to presume the resolution of the Directors which would have authorized the Cashier's act. The Directors *might* have authorized the Cashier to constitute the agency in question; and whether they had done so or not, was known to the Cashier, and not to the Secretary; and the letter of the Cashier was an implied assertion that the authority had been conferred. How was it then that the principle of the *Teller* case did not estop the bank from resisting the contract of the Cashier's appointee? The answer is easy.

The Cashier possessed no authority with which his act in appointing an agent for his corporation was in apparent conformity. The implied representation of his letter went to the terms of the power itself, which was not permissible.

If the Cashier had been in the daily habit of appointing such agencies, with the requisite approval of the Directors; and in the given case had acted without this approval, then we should probably have had a different decision.

The liability of the bank in the actual case demanded a view of the law to the effect that any officer capable of being authorized to bind his corporation and who asserted that he had been so authorized, might bind it to any one honestly believing his false representations;—a ludicrous position, truly.

Judge Dillon approves *Starin vs. Genoa*, and *Gould vs. Sterling*. They are in *People vs. Mead*, 36 *N. Y.*, 224, pronounced to be in conflict with the *Municipal Bond* decisions of this Court,—as unquestionably they are.

Clark vs. Des Moines City will not, I think, afford my opponents much aid and comfort. It relies upon *quasi* corporation decisions, based upon the *difference* between these and municipal corporations

proper,—to curtail of vital negotiable attributes the warrants of the latter, which yet it concedes to be, by virtue of their form, promissory notes; it ignores the strictly corporate, *quasi* private aspect of chartered cities; and it misses the real question involved,—that of estoppel *in pais*; and wastes its strength in combating positions that do not deserve serious confutation. And then it approves cases in conflict with the decisions of this Court; and embraces a view of the law of agency different from that which, as applied to corporations has by this Court been denominated "axiomatic."

The decision in *De Voss vs City of Richmond,* 18 *Grattan,* 338, already cited, superior in acumen to that of *Clark vs. Des Moines City,* is precisely in point in the present case. The Court there said:

"It is conceded that the bond held by DeVoss was executed and issued to him by the officers of the City to whom was entrusted by its laws the general duty of executing and issuing bonds. In the argument for the appellant, these officers were treated as the agents of the City in respect to the acts and functions of such officers, in like manner as to other corporations and their officers and servants.

"For the appellee it was contended that the functions of these officers in reference to the execution, transfer and renewal of bonds of the City, pertain to the execution by the City of the powers and duties devolved upon it in the character of a local government, and that the City can not be held liable for their misfeasance or negligence in the discharge of these functions, according the principles on which this Court proceeded in the *City of Richmond vs. Long's Admin.* 17 *Grat.,* 375.

"But that principle has no application to this case. The power in question in the case referred to, was one of those conferred upon the City for public purposes only, and pertained to its character as a local government. It was not conferred with any view to the private advantage and emolument of the City. But the power to borrow money is bestowed primarily for the advantage and benefit of the City. It has no direct relation to the powers and duties of the City as a local government. . . . . The City *quoad hoc* is a private corporation.

This is the very essence of the present case. The checks here were "executed and issued by the officers of the City of Nashville to whom was entrusted, by its laws, the general duty of ex-

ecuting and issuing" checks. And *quoad hoc* the city is to be dealt with as a private corporation. My adversaries conceded that if this were so, then the City was liable here.

The Court next deal with the argument, that in issuing the DeVoss bond, the officers acted without corporate authority. The authority relied on was the ordinance of April 14, 1862, passed in obedience to the confiscation decree of the Confederate Court, which the Court conceded to have been void. And it is perfectly plain that the ordinance was also void. And the Court pointed out that not even the void ordinance authorized the act of the officers; since that directed the issuance of only a bond with particular recitals, and the officers issued one without such recitals, an act without even a void resolution behind it. The following is the language of the Court:

"It is undoubtedly true that it was the intention of the Council that no bond in lieu of a confiscated bond should be issued in any case without the special statement on its face required by the resolution. *The prohibition is as plain as if the language of the resolution had been in the form of express prohibition.* As between the City and the officers, therefore, it limited, in respect to this class of bonds, the authority of the officers."

"But the authority of these officers to transfer bonds and issue new ones was not derived from this resolution. They had a general authority for these purposes, conferred upon them by ordinance. They had long been in the habit also of making such transfers and renewals, from which the public might have inferred a general authority to do so." . . . .

The Court said, with reference to the effect of the corporate resolution, treating it as valid, that they will assume for the purposes of the argument that "this resolution had the effect, in respect to this class of bonds, of taking away from the officers the general power which they before had, and of substituting for it a new and limited authority, of which the public must take notice, (that of issuing bonds in lieu of confiscated bonds, but only with proper recitals,—of issuing *reciting* bonds only.)

The Court proceeded: "Assuming that the officers had then only a limited authority, of the extent of which the public were bound to take notice, in respect to the renewal of this class of bonds, the counsel of the appellee contended that the bond held by DeVoss,

which was *not* issued in conformity with this authority, can not be held binding on the city.

"The counsel of the appellants contended, on the other hand, that the City can not be allowed to avail itself of this defense against DeVoss, who took the bond issued to him *without a knowledge of the fact that the officers exceeded their authority in issuing it.* And we think this position may be maintained on principle and authority."

The Court added that it was the officer's duty to make the necessary investigation at each successive transfer, and that they had all the means of doing so; citing *Davis vs. Bank of England,* 2 *Bing.* 393. (3 *Eng L. R.,* 444,) where the bank permitted stock to be transferred on a forged power of attorney and the Court held that the Bank could not refuse to pay dividends to subsequent purchasers of the stock.

The Court added: "There is nothing unreasonable or harsh in holding the City to be estopped from disputing the title of DeVoss. On the contrary, it is highly just and reasonable. The City appointed officers to issue its bonds, in whom it confided. . . . . Under these circumstances, it was natural that purchasers should presume that the officers did their duty. They had a right to rely on such a presumption in their dealings. Citing the *Turquand case,* 6 *El. & Bl.,* 327; *Prince of Wales Life and Educational Assurance Co., vs. Harding,* 96 *Eng. Com. L. R.,* 183; *Commissioners Knox Co. vs. Aspenwall, etc.*

The Court further added: "When, therefore, these officers failed in any case, through negligence, to certify on the face of a bond issued by them that it represented a confiscated bond, when such was the fact, *it was the common case of an agent acting negligently in the regular course of his employment.* The law is well settled and familiar, that in such cases the principal must bear the consequences of his agents negligence, as between himself and an innocent third person, even though the act or omission of the agent which constitutes the negligence, was wholly unauthorized by the principal, or even positively forbidden;" citing authorities.

And again: "The absence of a statement in a bond that it represented a confiscated bond, was equivalent to a representation to the person to whom it was issued, and to all others who might trade for it, that it did *not* represent such a bond. *It was in law the representation of the City, because made in its behalf by officers charged by it*

with the duty of issuing all bonds, and of representing on the face of each whether it did or did not belong to the class of confiscated bonds."

It had been pointed out by the counsel for the city that not only was the issuance of the DeVoss bond not authorized by the resolution, if valid;—not only was the resolution void;—but *such a resolution was ultra vires of the City itself,* to which the Court replied:

"It was said in the argument that the City itself had no authority under the charter to execute the bond to DeVoss, because it was not given for money lent the City, or for any other consideration. But the City had authority to execute bonds in proper cases, without limit as to number or amount; and for the reasons already mentioned, it can not allege against DeVoss, that this particular bond was not executed in a proper case. And it is at least doubtful, upon the authorities, whether a corporation can urge in any case against a third person who has contracted with it, that its contract was void because *ultra vires,* where the other party had no knowledge of the facts which made it so." Citing 35 *Eng. L. & Eq.,* 8; 3 *Hor & Nor.,* 323; 22 *N. Y.,* 258, etc., etc.

The Court then cite and apply *North River Bank vs. Aymar,* 3 *Hill,* 262; *Farmers' & Mechanics' Bank vs. Butchers' & Drovers' Bank,* 16 *N. Y.,* 125; *Griswold vs. Haven,* 25 *N. Y.,* 596; *Exchange Bank vs. Monteath,* 26 *N. Y.,* 505, *N. Y. & N. H. R. R. C. vs. Schuyler, etc.,* 34 *N. Y.,* 30; and announce as law the principle of agency pervading these cases, which, as shown has been approved by this Court in *Merchants Bank vs. State Bank,* 10 *Wal,,* 604.

Now it was more open to the City of Richmond to repudiate the DeVoss bond than to the City of Nashville to repudiate the Lindsey checks, upon the ground that the extrinsic fact showing a want of authority in the officers to issue was not peculiarly within their knowledge; since in the Auditor's office, whither DeVoss must have repaired in order to obtain the transfer on the City books of his bond, or certificate of indebtedness, was kept a record, called into requisition too at the very moment, in which he, as well as the officers of the City, might have traced back to its source his claim.

In the present case, checks being issued not only upon allowances entered upon corporate minutes, but to meet water-works and other exigencies under existing laws, the knowledge of the issuing officers was far more palpably peculiar; since it would be difficult for an out-

side party, even if permitted to ransack the corporate offices, to trace any particular check, when some might have to be sought for on the minutes of allowances; others on the water works journal, and others, again, on the books of other departments, to meet whose exigencies they had been issued under existing laws. As well look for a needle in a haystack. The records of the financial transactions of Nashville are none of them public books in any sense.

The principle of the Virginia decision would, of course, have held the City all the same if the issuing officers had corruptly manufactured and issued the bond, which afterwards came into *bona fide* hands. That case would have been as strong a one as the DeVoss case.

And let me again note, what seemed not to be grasped by my opponents below, that this is *not through the operation of the principle of negotiable paper*, but of estoppel *in pais*, applicable to the relation of principal and agent, in cases involving not only the execution of negotiable paper, but all the manifold kinds of transactions for which the services of an agent may be employed. The DeVoss bond was not a negotiable instrument.

The negotiability of the checks, figures in this branch of the the case, only to place in privity with the City the *bona fide* holder, at whatever remove. The negotiable attributes of past due paper payable to bearer suffice for this purpose.

The *Floyd Acceptances* 7 *Wal.*, do not help my opponents, as they seemed to imagine. The acceptances were pronounced void because if given in payment of supplies furnished, as claimed, they were payments in advance, and specially prohibited by the act of January 31, 1823. And then the Court say that under existing laws there could be no lawful occasion for any officer of the United States to accept drafts on the Government, page 681. If an officer possessed the power to accept for some purposes, and he accepted for other purposes, the purpose being the extrinsic fact peculiarly within the officer's knowledge, and the acceptance in apparent conformity with the power; assuredly, the Government would be bound, unless exempt from the well established principle pronounced in *Merchants' Bank vs. State Bank*, as applicable to corporations, "axiomatic."

If there is any principle distinguishing the relation of the Government to its officer in such case from that of an individual or a cor-

poration to its agent under similar circumstances, I am not concerned about that.

The case of *Marsh vs. Fulton Co.*, 10 *Wal.*, 681, has no bearing upon the present controversy. There the law authorized the County to subscribe to any railroad after the people had pronounced in favor of the measure at the polls. The people thus sanctioned a subscription to the Mississippi and Wabash Railroad Company. But afterwards the Legislature cut the road into three parts, and established a new company for each part; and after this the Clerk of the County Court, upon the authority solely of the vote to subscribe to the original company, undertook to issue bonds to the new companies. These bonds were, of course, held void.

To have held them valid would have involved that the Clerk had power to issue county bonds at his pleasure to any company. As pointed out by the Court, the Clerk was the mere amenuensis of the Board, and had no general power to issue bonds. The act in this case was not in apparent conformity with the terms of any power possessed by the assuming agent. The subscription was authorized only after it should have been sanctioned by a popular vote, and the Board of Supervisors, not their Clerk. were made the judges of this fact. Had *the Board* issued the bonds without the vote, the County would have been bound, for the Court have again and again decided that the purchaser need only see that the recitals of the bond assert compliance with the conditions of the issuance. Had the law empowered the *Clerk* to issue the bonds after the vote should have been cast, this would have constituted *him* the judge of this fact, and then the bonds issued by him, reciting compliance, would have held the County.

If the present suit were upon coupon bonds issued by the Mayor and Recorder, without authority from the Council, the case would be quite different; for the Mayor and Recorder have never been clothed, by the Council with the general power to issue the bonds of the City.

But suppose that they *were* empowered by the Council to issue the bonds, but only to holders of the floating debt of the City, (it being authorized by statute to fund the same), and they should, in fact, issue several of the bonds to a friend to start him in business—and these should come into *bona fide* hands—*here* is an analogous

case—an act in apparent conformity with a power actually held—a power impliedly constituting the officers the judges as to the extrinsic fact who was such a creditor.

Now the Mayor and Recorder *have*, for many years, been actually clothed with the power of issuing checks, like those in suit, upon certain occasions, as to the existence of which they were thereby constituted the judges; just as the agent in the *North River Bank* case was necessarily the judge of the fact, whether the notes he issued under his power were really executed in the business of his principal.

In the *Fulton County* case, the court quote from the *Floyd Acceptances* as follows: "In each case, the person dealing with the agent, knowing that he acts only by virtue of a delegated power, must, at his peril, see that the paper, upon which he relies, comes within the power under which the agents acts. And this applies to every person who takes the paper afterwards; for it is to be kept in mind that the protection, which commercial usage throws around negotiable paper, can not be used to establish the authority by which it was originally issued."

This is a precise statement of my own conception of the law. It is but a different form of the proposition, that the person taking the paper is bound to see that the act of issuing it comes within the terms of a power actually possessed by the agent. But where the act is *intrinsically* conformable to the power, *extrinsic* non-conformity unknown to the other party, can not, as we have seen, be afterwards set up by the principal.

In the same report, on pp. 644–5–6, in *Merchants Bank vs. State Bank*, the Court had just explicitly approved the principle, in this regard, of the *North River Bank case;* the *Bank Teller* case; the *Schuyler* case, etc.

The quotation from the *Floyd Acceptances*, applied to the present case, means that plaintiff was bound to see that the Mayor and Recorder were the officers actually possessed of the power of issuing such checks as he was about to purchase. But finding that they *had* such power, he was entitled to confide in their representation of the extrinsic fact as to the proper occasion of its exercise, implied in the issuance itself.

In *Police Jury vs. Britton*, 15 *Wal.*, 566, the managers of one of the meagre, skeleton, *quasi* corporations, the nature and powers of which have been discussed, undertook, without any statutory authority for the purpose, to issue coupon bonds, to fund the debt of the Parish

of Tensas, Louisiana. Of course, the bonds were held void. The agents here *possessed no power with which such an act was in apparent conformity.* In New York, similar organizations are held, as we have seen, to lack the implied power to issue completely negotiable paper—a power conceded by the same courts to chartered cities.

It is likely that even this case will be relied on by my opponents. They laid stress below upon cases equally irrelevant. I need not waste time in pointing out that here the corporation itself had not even apparently the power assumed. I pass on to the next contested position of the Court below.

(5.) IF IT WAS THE COMMON USAGE OF THE FINANCE COMMITTEE, KNOWN TO THE CORPORATION, TO PLEDGE ITS CHECKS AS SECURITY FOR ITS NOTES, AND THE CHECKS IN SUIT WERE SO PLEDGED, IN CONFORMITY WITH THIS USAGE; THEN, EVEN IF THEY WERE SOLD BEFORE THE MATURITY OF THE NOTE THEY WERE GIVEN TO SECURE, THE PURCHASER, IF WITHOUT NOTICE OF SUCH PREMATURE SALE, OR OF ANY IRREGULARITY IN THEIR ISSUE, WOULD BE ENTITLED TO RECOVER FOR THEIR FACE AND INTEREST.

This position calls for little additional discussion. That just maintained suffices to estop the city from disputing the authority of the Mayor and Recorder to issue the checks, thereby establishing them upon the footing of corporate instruments; and my first and second positions, if made good—that they were the negotiable promissory notes of the city (by virtue of their form and, cumulatively, through the operation of *Code of Tennessee, sec.* 1957, making negotiable in the same manner as promissory notes, every bill, bond, or note for money), and that the city had the power, under its charter, to make such paper—exempt them, in *bona fide* hands, against equitable defenses; and to show, additionally, that the Corporation knew of and sanctioned the usage by which the checks were pledged by the Finance Committee as collateral security for a corporate obligation—thereby implicating it, not only constructively but in point of fact, in the very transaction through which they got out into circulation, adds little to the legal merits of the plaintiff's case scientifically considered, although it may serve as a makeweight in appealing to the

feelings of a court and jury desirous of enforcing, if possible, the natural justice of the case.

Whether the Corporation did actually know of the usage in question was a matter for the jury, and is not under review here. The evidence that it did was perfectly conclusive, showing that not only the City Council officially, but every corporator who was *sui juris* knew all about it.

For the effect of such knowledge, even of the corporators, I refer to the following cases, which, of course, apply with an *a fortiori* where there is knowledge of the governing body as officially constituted.

Alleghany City vs. McClerkan, 14 *Penn. St.*, 82. Suit on city scrip. Defense that issuance unauthorized by charter. The court said—p. 83:

"The act of Assembly incorporating the City of Alleghany was not read on the argument, but we take it for granted that it contains no express authority to the Corporation to issue such notes as those embraced in the action. But it does not follow that the corporators are not liable for them in their corporate capacity. They have received value for them in the various public works and improvements created and made in the city through their instrumentality, and it hardly comports with fair dealing that they should seek to exonerate themselves from debt on this account, contracted by and through their accredited agents, *and with their silent acquiesence.* There is power to contract, undoubtedly; *and if a series of contracts have been made openly and publicly, within the knowledge of the corporators, the public have a right to assume that they are within the scope of the authority granted.* A bank, which had long been doing business of a particular character, would not be exonerated from liability because such business was not expressly authorized by its charter. The object of all law is, to promote justice and fair dealing, when that can be done without violating principle. We can not perceive that any principle is violated by holding a corporation liable for the contracts of its accredited agents, even not expressly authorized, *when these contracts for a series of times were entered into publicly, and in such a manner as by necessary and irresistible implication to be within the knowledge of the corporators.* It was the acquiesance of the corporators, and the habit and custom of business of the Corporation, that induced the public to give credit to the scrip or notes which were

evidence of the contract. But when we add that the corporators themselves received the value of these notes or contracts, in the erection of improvements in the City, and enjoyed, and still enjoyed the value of them, the conclusion is irresistible that the Corporation ought to pay them by the assessment of taxes on the corporators, if it has no other available means. The debt is due by positive engagement. It is due *ex equo et bono* in the forum of conscience and the forum of law. One rule of law is often met and counter checked by another of equal force, so that though the corporators are in general protected from unauthorized acts of their agents; yet, at the same time, a rule of equal force requires that they should not deceive the public, or lead them to trust and confide in unauthorized acts of their agents. If they received the avails and proceeds of these acts, it is implicit evidence that they consented to authorize them. They adopt the act, and are responsible to those who, on the faith of such acquiescence and approbation, trusted their agents."

In *State ex rel. vs. Van Horne, Auditor of Muskingum County*, 7 *Ohio St.*, 327, the tax payers were authorized by statute to vote that the trustees should subscribe for railroad stock when the given road should have been permanently located. They voted for a subscription before the location—and bonds were issued. Payment of interest was resisted upon the ground that the act of the Trustees in issuing the bonds was void, because the voters had no power to authorize it until the location of the road. The court said that if the power of the trustees had to be derived altogether from the law, their action might be void: but that the law empowered the voters to authorize them to make the subscription, and they had done so, and *none of the tax payers had interposed to prevent the issuance of the bonds*, and having remained quiescent, and allowed the bonds to get into circulation, they could not resist them in *bona fide* hands.

In *State ex rel vs. Smead, etc., Trustees Union Township, etc.*, 8 *Ohio, St.* 401, this decision was approved. The Court here held in a similar case that the inhabitants and tax payers having called an election, and asserted their right to subscribe for the stock, and to pay for it with bonds, and by their vote (247 *pro* to 41 *contra*) instructed the Trustees to subscribe and to issue negotiable bonds, and *no individual* protesting or objecting, the Corporation was estopped from contesting the bonds upon the ground that they were not issued in conformity with the statute.

The Court added: "And, as if to give to third persons still

stronger confidence in the bonds, the Township has continued, year after year for a number of years, to assess and pay the tax, to meet the annual interest upon these securities."

In Town of Keithsburg vs. Frick, 34 *Ill.*, 421, the Town was held estopped from setting up the invalidity of its bonds after having repeatedly recognized them by paying interest upon them.

The record here (pp. 6–7) shows that for years it had been the custom of the City to receive such instruments as those in suit "for taxes and other dues." Also, that "at the time when the checks sued on were made, and at the time they were bought by plaintiff, . . . many such checks were outstanding unpaid, and were commonly bought and sold in the market, and that nearly all the taxes were paid to the City Collector in such checks."

Such recognition of the validity of the checks brings this case within the principle of estoppel of *Town of Keithsburg vs. Frick*, 34 *Ill.*, 421; *State ex rel. vs. Smead, etc.*, 8 *Ohio, St.* 401, *etc., etc.*

Stress is laid upon the same grounds of estoppel by this Court in *Supervisors vs. Schenck*, 5 *Wal.* On page 782 the Court say:

"All the acts of the Board of Supervisors of the County, in making the subscription, purchasing the shares, issuing the bonds, and exchanging the securities, appear to have been open and well known to the Corporation, and yet they constantly suffered themselves to be represented in the choice of officers, and in the management of all the affairs of the railroad company, and have voluntarily voted taxes for the payment of the yearly interest on the bonds, and actually paid the same, as admitted in the special plea.

"Examined in the light of these suggestions, it would be difficult to imagine a case where the rule that a subsequent ratification is as good as a previous authority, can be more justly applicable than in the case under consideration."

On page 783, the Court approve *Keithsburg vs. Frick;* and also *Johnson vs. Stark County*, 24 *Ill.*, 90, where the reception by County officers of shares in exchange for their bonds, the voting for directors at two elections, and paying two annual instalments of interest, were held to constitute as satisfactory a ratification of the issue of the bonds as an order of the Supervisors would have been.

On page 782, the Court said: "Like an individual, a corporation may ratify the acts of its agents done in excess of authority, *and such ratification may in many cases be inferred from acquiescence in those acts, as well as from express adoption.*"

The ruling now under discussion, of the Court below in the present case, was cautiously guarded by the proviso as to the purchaser,—that he must have had no notice of the premature sale of the checks, "or of *any* irregularity in their issue."

As to the matter of interest, my opponents misconceived below the significance of the Treasurer's endorsement upon the checks. They attempted to establish that this implied a presentation and dishonor. But the record shows (what is the truth of the matter) that such was not the case. Page 6, lines 5, etc., from bottom: "It was usual to present such checks for endorsement to draw interest, when it was known that there were no funds for their payment."

And as to the very checks in suit, the record shows that they were not to be even issued until the maturity of the note they were given to secure. How then could the Treasurer's endorsement, bearing same date as the checks, import dishonor?

The special arrangement, as appears from the record (and as it always was, in fact) was that the Treasurer's endorsement was to operate as an acceptance placing the instrument upon the footing of a bill payable on demand with interest from date.

Interest is a matter of agreement. See a full discussion of the history of the law of interest, and of the grounds upon which it is allowed, by Judge Spencer, in *Glass Factory vs. Reid*, 5 *Cowen*, 588 (Court of Errors), citing Mr. Jefferson's luminous communication upon the subject, to the British Minister. It is laid down in that case that "where interest has under like circumstances been allowed by the debtor to other creditors, the knowledge of which comes to the creditor in the given case, and he acts in the expectation of a similar allowance, there would be good ground to presume an agreement to pay interest also to the new creditor."

Upon pages 610–15, it is shown that interest depends upon the agreement of the parties, which may be implied from custom or the usage of the business in which the debt has been contracted when known to the parties, or reasonably to be presumed to have been known;—where the principal was payable at a given time and there has been a default;—where the account is liquidated and the debt due and payable;—and where other circumstances in the transaction between the parties furnish evidence of intention of the debtor to pay interest.

The record shows (p. 6) that "for many years the custom of defendant corporation had been to issue checks in form the same or

similar to said three checks (those in suit), in payment of debts, *or* to draw money from the Treasury,"—two several purposes. If the money was to be drawn from the Treasury, the party presented the warrant and received the money. But if the arrangement was that he was to wait for his money, or was to take the check as a payment of his claim, then he presented it for endorsement, and it did duty as a City note, payable on demand with interest (which was according to the custom of the City, universally known) allowed from date.

I have now, to the best of my ability, maintained the correctness of the essential rulings of the Court below in the case before your Honors. The other rulings contained in the record were corollaries from these, and must stand or fall with them.

The Court refused to allow evidence that the checks in suit were issued otherwise than upon a proper occasion, because unless the plaintiff was to be shown to have been aware of this extrinsic fact, it was immaterial; since the City was estopped to set up this fact, as has been shown.

The Court admitted evidence to show that the practice of hypothecating checks for money loaned was known officially to the City Council, and had been pursued for several months; which was certainly correct.

The Court excluded evidence offered to show that the custom of the City until some time after September, 1868, had been to issue no checks except upon allowances, or under existing laws,—a matter clearly irrelevant; since a knowledge of this custom would only have operated to assure plaintiff that his checks were issued conformably thereto. What he wanted to know was the extrinsic fact whether his checks were, or were not, issued conformably to the custom. Unless he was to be shown to have been aware of the extrinsic non-conformity, it would have availed nothing to have proved such a custom.

My opponents requested the Court to charge: 1. That the City had no power to borrow money under its charter, and that, *therefore*, any checks issued for this purpose would be *ultra vires* and void. Power clearly existed; and it it did not, the conclusion was a *non sequitur;* since if the checks might be issued for other purposes, and they were in fact issued to borrow money, the purchaser, (as we have seen) unless he had reason to suspect this, was entitled to presume that they were issued for legitimate purposes.

2. They requested the Court to charge that if money might be

borrowed it was only by ordinance, and any checks or other instruments issued for the purpose of borrowing money without ordinance would be void;—clearly a *non-sequitur*, even if the requirement of an ordinance were correct, as we have seen that it was not; since corporations may become bound by implication, presupposing ordinance or estopping denial thereof, etc. But here again, if a check issued to borrow money were void in the hands of one knowing its origin, it would *not be* (as we have seen), in the hands of one honestly supposing that it was issued for a legitimate purpose and having no reason to suspect otherwise.

3. That it was the duty of the purchaser of the checks to take notice of the powers of the officers as defined by the charter and ordinances, *and ascertain whether the checks were authorized by ordinance.* The italicized clause a palpable *non-sequitur;* since the ordinances show that checks may be issued legitimately otherwise than upon an ordinance, viz: to meet the exigencies of the waterworks, or other emergencies under existing laws; and then the public (as we have seen) are not bound to inspect the corporate records. They may confide in the implied representation of the Mayor and Recorder of the extrinsic fact of a proper occasion of issuance, which matter is peculiarly within the knowledge of these officers.

4. That the City Council as the legislative department of the Corporation could not delegate its powers to one or more officers; *that the contracting of liabilities for corporate purposes, etc., etc.,* were *legislative functions* that could not be delegated. Italicized clause clearly wrong; as liabilities *may* be contracted for corporate purposes otherwise than by the direct exercise of the legislative function; and in nine cases out of ten *are* otherwise contracted.

5. That the City could not issue negotiable securities under its charter. Clearly wrong.

6. That the checks sued on could only be sued on in the name of the original payee, etc., etc. Clearly wrong.

7. That unless the checks sued on were authorized by Corporation ordinance, plaintiff could not recover, etc., etc. Mere repetition of error.

8. That the checks were not in their nature negotiable without express authority from the legislative department of the Corporation, conferring the negotiability. Clearly wrong.

9. Stating hypothetical case, involving mere repetition of posi-

tions separately rejected, and asking to have such case pronounced upon adversely to the plaintiff. Of course refused.

10. That if the checks in suit were not countersigned by the Mayor, but by the Chairman of the Street Committe signing as Mayor *pro tem*, then there could be no recovery. Absurd. The record shows, page 8, (17) that the ordinances of City devolved on the Chairman of the Street Committee the duty of acting as Mayor *pro tem*, in case of vacancy "by death, resignation, removal from office, or temporary absence of the Mayor," until such vacancy is filled, or the return of the Mayor to the city. The duty of countersigning checks is imposed on the Mayor not by the charter, but by ordinance merely (record, p. 8, (17)); and, of course, the same power might devolve *this* duty, in case of his absence, upon any other corporate officer; however it might be as to the duties imposed upon the Mayor by the charter.

It is familiar law that if a single proposition of a requested change is erroneous, the whole must be refused.

R. W. P. Smith

Brief 6-74-

BRIEF.

1. The instruments in suit,—orders of Recorder, countersigned by Mayor, upon Treasurer—are promissory notes.

Story on Promissory Notes, § 16; *Miller vs. Thompson*, 3 *Mas. & Gran.* 576; *Clark vs. Des Moines City*, 19 *Iowa*, 208; *Lyell vs. Supervisors*, 6 *McLean*, 447; *Bull vs. Simms*, 23 *N. Y.*, 570; *Fairchild vs. Railroad Co.*, 15 *N. Y.*, 337; *Campbell vs. Polk Co.*, 3 *Iowa*, 470; *Steel vs. Davis Co.*, 2 *G. Greene*, (*Iowa*,) 469; *Hasey vs. White Pigeon Beet Sugar Co.*, 1 *Doug.*, 193; *Crawford Co. vs. Wilson* 2 Eng. (*Ark.*) 214; *Justices vs. Orr*, 12 *Ga.*, 137; *Kelly vs. Mayor*, 4 *Hill*, 263.

Lucas, Turner & Co. vs. San Francisco, 7 *Cal.*, 462, held warrant void *because* a note:—City being specially prohibited from making notes. *Bayerque vs. Same*, 1 *McAl.*, 175, involved same reason.

Being promissory notes payable to bearer, they were, of course, negotiable. And Code, sec. 1957, would have made them so, had they not been so otherwise.

Such instruments, issued "in payment of debts *or* to draw money from treasury," (Record, page 6). Not only in legal effect notes, but intended as such.

2. The City had power, under its charter, to execute negotiable paper, and to borrow money.

For powers conferred by charter, see act of January 31, 1848. *Comp. City Laws*, 1868, page 3; also amendment, sec. 12, act February 18, 1858. *Ib.* pp. 10-11.

That such powers imply powers in question,

Ang. & Am. on Cor. § 257; *Union Bank vs. Jacobs*, 6 *Hum.*, 525; *Mills vs. Gleason*, 11 *Wis.*, 470; *Ketchum vs. Buffalo*, 14 *N. Y.*, 356; *Clark vs. School Dist.*, 3 *R. I.*, 199; *State vs. Madison City*, 7 *Wis.*, 688; *People vs. Brennan*, 39, *Barb.*, 522; *Bank of Chilicothe vs. Chilicothe*, 7 *Ohio*, 358; *Douglass vs. Virginia City*, 5 *Nevada*, 147; *Commonwealth vs. Pittsburgh*, 34 *Penn. St.*, 496; *Parsons on Bills & Notes*, 164.

The authorities do not make distinctions as to implied powers between chartered municipal and private corporations; but between *quasi* corporations,—(mere skeleton corporations,) and chartered municipal and private corporations. And where warrants held not fully negotiable, this not because of their form, but on account of defective power of the body issuing them.

Courts cite cases of private, as applicable to municipal, corporations, and *vice versa*, *e. g.*,

Knox Co vs. Aspenwall, 21 *How.*, 540, relies on *Turquand case*, 6 *El. & Bl.*, 327; *Supervisors vs. Schenck*, 5 *Wal.*, 782, on *Bank U. S. vs. Dandridge*, 12 Wh., 70; *DeVoss vs. Richmond*, 18 *Grat.*, 358, on *Turquand case*, *Bank Teller case*, *etc.*, 2 *Coldwell*, 654, quotes, as to Memphis, very words of *Union Bank vs. Jacobs*, and merest glance into *Ang. & Am.*, 237-238, etc., etc., conclusive of this.

And chartered city *is* as to large class of powers, a private corporation.

Bailey vs. Mayor, 3 Hill, 531; *Detroit vs. Corey*, 9 *Mich.*, 165; 5 *Cal.*, 306; *Lloyd vs. Mayor*, 5 *N. Y.*, 369; *DeVoss vs. Richmond*, 18 *Grat.*, 358; *Dillon on Munic. Corp.*, page 33. *Ib.* § 39.

Nature of *quasi* corporations—hardly corporations at all.

Cooly's Const. Lim., pages 240-247; *Dillon on Munic. Corp.*, page 31, § 10, *note*; *Ib.*, page 53; *Ib.* § 39; *Hamilton Co. vs. Mighels*, 7 *Ohio St.*, 109.

Courts deny *quasi* corporations implied power (conceded to cities), on account of meagreness of corporate life.

Goodhue vs. Comm., 11 *Minn.*, 40; 9 *Ind.*, 224; *Dillon on Munic. Corp.*, page 396, § 407, *note* 1, etc., etc. etc.

Judge Dillon's *ipse dixit*, that "ordinary warrants," do not cut off equities, true only as to *quasi* corporation warrants; and solely on account of defective power. City with charter, for manifold purposes private corporation. *Quasi* corporation purely public. Financial transactions of City, of private character.

DeVos vs. Richmond, 18 *Grat.*, 338.

Quasi corporation cases, based on meagreness of corporate functions, inapplicable to chartered City, with exuberant powers. New York decisions deny power to former, (5 *Denio*, 517; 35 *Barb.*, 136; etc.,) and concede it to latter, (*Kelley vs. Mayor*, etc., 4 *Hill*, 263.)

3. Long continued usage of execution by Mayor and Recorder of such instruments, evidence of authority to execute. Corporation holding out to public, officers as clothed with functions, bound by their acts within scope of powers usually exercised. 2 *Green, Ev.* § 62; *Ib.* § 65; *Story on Agency*, § 55; *Olcott vs. R. R. Co.*, 27 *N. Y.*, 546; *Bank U. S. vs. Dandridge*, 12 *Wh.*, 64; *Exchange Bank vs. Monteath*, 17 *Barb.*, 171; *Lester vs. Webb*, 1 *Allen*, 34; *Abbott's Dig. Corp.*, sec., 30, 31, 32, 35; *Supervisors vs. Schenck*, 5 *Wal.* 782. In *U. S. vs. Reside*, doctrine applied by Judge Baldwin to Government; but this not legitimate. Corporate resolution may be presumed from acts of officers acquiesced in; but act of Congress, source of Government officer's authority, not subject of presumption,—if wanting, must be known to be wanting.

4. If instruments in suit issued by officers authorized to issue on proper occasions, purchaser not having reason to suspect otherwise entitled to presume proper occasion of issuance.

Where act of agent apparently conformable to power, party dealing with agent may accept his statement as to extrinsic fact peculiarly within his knowledge, upon which depends real conformity.

North River Bank vs. Aymar, 3 *Hill*, 263; agent authorized to execute notes in principal's business, executed one for accommodation of third party; and principal held.

Paluana vs. Sullivan, 4 *Mass.*, 45 (Parsons, C. J.); agent authorized to write notes on inside of blank paper left indorsed by principal, to be issued in principal's business, and note filled up and *otherwise* used; and principal held.

Farmers' Bank vs. Butchers' Bank, 16 *N. Y.*, 133; teller, authorized to certify checks only when funds on hand, certified when no funds; and bank held.

Approved in *Merchants' Bank vs. State Bank*, 10 *Wal.*, 644, and principle pronounced "axiomatic."

N. Y. & N. H. R. R. vs. Schuyler 34 *N. Y.*, 69; agent authorized to issue certificates of stock when previously issued ones were surrendered, issued them without this; and the over issues held valid in *bona fide* hands.

Knox Co. vs. Aspinwall, 21 *How.*, 540; Commissioners empowered to issue bonds

when should have been authorized by vote of corporators, and issued without the proper vote; and bonds held valid.

British Royal Bank vs. Turquand, 6 *El. & Bl.*, 327; directors empowered to issue bond, only when authorized by resolution of shareholders, and they issued it *without* the resolution; and bank estopped from denying resolution. Approved in *Knox Co. Case.*

Identical case, where Mayor and Recorder empowered to issue checks when authorized by resolution of Council, etc., etc., and they issue without resolution. City estopped to deny resolution.

Knox Co. vs. Wallace, 21 *How.*, 547; *Bissell vs. Jeffersonville*, 24 *How.*, 288; *Woods vs. Lawrence Co.*, 1 *Bl.*, 386; *Moran vs. Miami Co.*, 2 *Bl.*, 722; *Mercer Co. vs. Hackett*, 1 *Wal.*, 83; *Gelpcke vs. Dubuque*, *Io.* 175; *Van Hostrup vs. Madison City*, *Ib.* 291; *Meyer vs. Muscatine*, *Ib.* 384; *Supervisors vs. Schenck*, 5 *Wal.* 772; *Lee Co. vs. Rogers*, 7 *Wal.*, 181; *Amy. vs. Pendleton Co.*, 13 *Wal.*, 298; *Lexington vs. Butler*, 14 *Wal.*, 282,

Also, *DeVoss vs. Richmond*, 18 *Grat.* 338; *Prince Wales Life & Ed. As. Co. vs. Harding*, *El., Bl., & El.* 183.

Mayor and Recorder of Corporation, its agents to issue checks, equally as the Commissioners, etc., agents of their corporations (in foregoing cases) to issue the bonds. Grant of power, in either case, to issue after certain prerequisites fulfilled, impliedly required agents to adjudicate as to fulfillment of prerequisites. Corporations involved estopped from disputing adjudication implied in issuance.

Action of Mayor and Recorder within their powers as much action of Corporation, as action of Council within their powers. Either merely wield what powers of Corporation validly bestowed upon them. *Inhabitants* are the Corporation. Act January 31, 1848, Sec. 1. *Clark vs. Des Moines City*, 19 *Iowa*, see page 209. Name of Corporation and name of agents being same, immaterial. Mayor and City Council of Nashville in one sense, mere agents of Mayor and City Council of Nashville in the other sense. Act of Mayor and City Council, the agents, not that of Corporation, unless, etc. And in such case, act of Mayor and Recorder equally that of Corporation.

Parallel perfect between act of Mayor and Recorder presupposing requisite resolution of Council authorizing issuance of checks; and act of Mayor and City Council,—the agents,—presupposing requisite vote of corporators authorizing issuance of bonds.

Either case, in the abstract, that of agents clothed with authority limited in exercise to certain cases and thereby necessarily made the judges as to those cases. Fact as to whether resolution of Council, or exigencies of water-works, or other emergencies under existing laws, authorized issuance of checks, an *extrinsic* one, peculiarly within knowledge of the officers.

Public not charged with notice of private records of City; entries of financial transactions, of this character. *DeVoss vs. Richmond*, 18 *Grat.*, 338.

Case distinguished from *Clark vs. Des Moines City*. There allowance by Council the *only* proper origination of warrants; and charter *expressly required record of these to be laid open to public*. *Aliter* here. Allowance by Council only one of several sources of origination; and no such book.

But *Clark vs. Des Moines City* erroneous. Misconceived point involved. Sup-

posed plaintiff to contend that negotiability of form precluded contestation of authority. Relied on *Gould vs. Sterling*, etc., pronounced (in 36 *N. Y.*, 224) in conflict with *Knox County vs. Aspinwall*. Maintained doctrine of dissenting opinion of Comstock, J., in *Bank Teller* case, 16 *N. Y.*, 143, and evidently missed significance of the adverse reasoning of Judge Selden, page 136 of 16 *N. Y.*, same case, approved by this Court in *Merchants' Bank vs. State Bank*, 10 *Wal.*, 644.

Note 1, Sec. 429, *Dillon on Municipal Corporations*, shows misconception of author as to principle of estoppel enforced in *Bank Teller* case and *Municipal Bond* cases, by view taken of *U. S. vs. Bank of Columbus*, 21 *How.*, 356.

The principle involved is estoppel *in pais;* not exemptions of negotiability. One of two innocent persons having to suffer from act of Mayor and Recorder in line of their agency, is shown be the City, from whose act in appointing and accrediting the agents to the public as trustworthy, the loss emanated; and not the purchaser, who merited bestowed confidence where the City invited it.

Dows vs. Nickol, 1 *Selden*, 289; *De Voe vs. Richmond*, 18 *Grat.*, 33, precisely in point (ably and able).

5. If usage of Finance Committee, known to Corporation, to pledge checks as collateral security for notes, and the checks prematurely sold; still, purchaser ignorant of any irregularity, entitled to recover.

This results from application of propositions previously maintained;—that the checks are promissory notes, entitled by virtue of their form (and cumulatively through Code 1957) to attributes of negotiability;—that City has power to execute such instruments; that Mayor and Recorder being agents of the City to issue them, purchaser might confide in their assertion, implied in issuing, as to existence of proper occasions of issuance,—of extrinsic conformity to power, of acts intrinsically conformable.

But, for effect of estoppels resulting from acquiescence, see *Allegheny City vs. McClurkan*, 14 *Penn. St.*, 82; *State vs. Auditor*, 7 *Ohio St.*, 327; *State vs. Trustees*, 8 *Ohio St.*, 401; *Supervisors vs. Schenck*, 5 *Wal.*, 782.

And estoppel resulting from payment.

Keithsburg vs. Frick, 34 *Ill.*, 421.

The endorsement of the Treasurer did not import that the checks had been presented for payment and dishonored. The custom, as we have seen, was to issue such checks "in payment of debts *or* to draw money from the treasury." (p. 6, (12) record).

And that when issued in payment of debts, and not to draw money immediately from the treasury, it was the custom to present them for the Treasurer's endorsement of the date, and afterwards to allow interest from the date endorsed; thereby placing them on the footing of bills accepted payable on demand with interest from date.

There was no evidence that those in suit were ever presented for payment; the complaint being that they were in fact not to have been issued (still less paid) until the maturity of the note they were given to secure.

Interest is matter of special agreement.

Glass Factory vs. Reid, 5 *Cowen*, 588.

The endorsement taken in connection with the custom entitled purchaser to interest.

The case as contemplated by the especially contested ruling below was simply the *North River Bank* case over again.

The agents of the Corporation to execute its checks for prescribed purposes, executed some for different purposes; but the purchaser supposed these to have been executed really as well as apparently for the prescribed purposes.

But the *real* case, as sufficiently disclosed, was that the Corporation itself knew of and sanctioned the action of the agents in executing and issuing the checks as they did; and the bad faith of the party whom it trusted to retain them until the maturity of the note they were given to secure, cannot be allowed to prejudice the innocent purchaser.

R. McP. SMITH,
Counsel for Defendant in Error.

R. McP. Smith
for Defs in Error

Supreme Court of the United States.

OCTOBER TERM, 1873.

THE MAYOR AND CITY OF NASHVILLE, Plaintiffs in Error,

vs.

WILLIAM RAY, Defendant in Error.

No. 166.

Now, at this term of said court, after the delivery of the judgment reversing the judgment of the court below, comes the defendant in error, and moves the court that the said judgment be vacated or opened, and that said cause be reheard, for the causes following, namely:

1. That the opinion pronounced for the majority of the court proceeds upon an error of fact, in the particular that it states that on the 16th of March, 1868, the Legislature of Tennessee passed an act "by which it was provided that the taxes necessary to pay the coupons and interest on the bonds and funded debt of the city should be kept distinct, and should be payable only in legal currency, and no checks or orders of the city were to be received therefor." And that it was also enacted by the same statute, "that the amount necessary to be raised by tax for the sinking fund for paying said bonds, and *for the support of the public schools, should be paid in the same manner.*"

Whereas the said statute, in the respect aforesaid, is in the words following:

"SECTION 10. That the City Council shall, within two weeks from the election of the assessor, and before he shall with his assistants have completed the valuation, determine the amount of taxes required and necessary to be raised for the coming year, including the amount required for the

payment of the coupons and interest on the bonds and funded debt of the city, which shall be kept separate and distinct on the assessment roll and book, payable only in legal currency, for which no checks or orders of the city will be received or collected. And the amount necessary to be raised for a sinking fund for the final redemption and payment of such bonds and funded debt, which the City Council may also determine, shall be paid in the same manner. And also the amount necessary to be raised for the support of the public schools, which they may in like manner determine, shall be payable. And they shall determine the amount necessary for ordinary revenue, and all the appropriations for the year. And they shall determine the rate of per cent. requisite for each division to raise such separate amounts. And any diversion of the first division, or, *after they determine for legal currency, of either of the two next divisions, shall be unlawful*, and subject every member of the City Council voting for or otherwise aiding the same to be individually liable therefor. And the several divisions or rates, in legal currency *or otherwise*, shall be kept, collected, accounted for, and paid over to the treasurer in such divisions, as separate *funds*, by the assessor and collector."

Whereby it appears by said statute that the taxes raised for school purposes might, at the option of the City Council and by its vote, be made payable in legal currency, or left to be paid in the checks or orders of the city, if said Council did not determine for payment in legal currency. And, therefore, no such determination for legal currency appearing, but the course of practice, as a fact, being the reverse, as appears in the record, and the said statute providing that such checks or orders of the city so received should be "paid over to the treasurer in such divisions, as separate *funds*, by the assessor and collector," such checks and orders became and were funds in the hands of such treasurer for the purpose of meeting the proper school expenses of the city.

And so the defendant in error says that the said judgment of said court, based upon said statute, was manifestly erroneous, and ought to be vacated or reopened, that the cause may be further heard.

2. And the said defendant further shows to the court here that the said judgment ought to be vacated or reopened, and a rehearing had, because, in the opinion as delivered for the majority of said court, a determination purports to have been made respecting the right of the defendant in error to recover back the money innocently advanced by him to the use of the city, and by its officers applied to the discharge of its just and lawful obligations, adversely.

Whereas the said defendant respectfully submits that the aforesaid question did not properly arise at the hearing of this case; that no special exception was taken by the defendant below to the ruling of the court below on that point, and no verdict rendered or judgment pronounced thereon, and no error was assigned respecting the same; nor was the point argued upon either side at the hearing, such argument having been omitted on the part of the defendant in error, for the sole reason that it appears by the record that, under the instructions of the court below, judgment was rendered for the full amount of the plaintiff's claim upon the notes and orders of the city, as such, and not in respect to any right of recovery he might have for money received by the city to his use, or by it obtained from him as a loan or otherwise.

And so, for the causes aforesaid, appearing in the said statute of Tennessee, in the record, and in the opinion of the court above referred to, the said defendant in error respectfully moves that the said judgment be opened, vacated, or set aside, and that said cause be heard *de novo*.

WILLIAM RAY,
By his attorney, GEORGE F. EDMUNDS.